91-1973

No. _____

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1991

MICHAEL K. TOPALIAN, WARREN B. FIENGA, ROY JACOBS, JR., RICHARD OROZCO, JUAN GARCIA-QUIROGA, JEAN STEUBING, CHARLES W. ANDERSON, FRANCIS D. COVERT, RICHARD H. MANUEL, JACK E. BURROUGHS, DON W. BOYETT, BOBBY W. McDONALD, CHARLES F. LACELLE, RICHARD D. MIKLES AND MJM VENTURES,

*Petitioners,*

v.

JOHN N. EHRMAN, EHRMAN INVESTMENT GROUP, INC., W. RODERICK JOHNSON, W. RODERICK JOHNSON, P.C., RICHARD O'DONNELL, HOUSTON PETROLEUM CO., INC., JOEL A. MIDDLEBROOK, JOEL A. MIDDLEBROOK, CPA, VICTOR B. RUSSEK, RUSSEK CO., BERT GAMBLE, RIO BRAVO OIL CO., INC., ROCKWOOD INSURANCE CO. AND ROBERT E. ECKIS, JR.,

*Respondents.*

**Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the Fifth Circuit Panel's holding – based on no cited precedent – that disclaimers in Respondents' Confidential Offering Memorandum served to absolutely shield Respondents from all charges of securities fraud, regardless of the circumstances, is in direct conflict with the law of every Circuit, including the Fifth, as well as Supreme Court precedent.

2. Whether the Panel's holding that all Petitioners should have known about Respondents' alleged securities fraud by May 1, 1985 directly conflicts with the leading Fifth Circuit case as well as the case law of every Circuit to have considered similar cases.

3. Whether the Fifth Circuit Panel's application of summary judgment standards is in direct conflict with Fifth Circuit precedent, the precedent of other Circuits, clashes with Supreme Court case law governing summary judgments, and threatens to severely undermine the clear Congressional purpose underlying the securities laws and the RICO Statute.

4. Whether the record makes clear that Respondent **EHRMAN** and other moving parties knew that material factual disputes existed when they filed their summary judgment motions and intended to "railroad" Petitioners through an illegitimate and premature motion for summary judgment as a last ditch effort to avoid a trial they knew they could not possibly win.

5. Whether the new **Section 27A of the 1934 Securities and Exchange Act** requires, on the facts of this case, that

## QUESTIONS PRESENTED – Continued

case law ante-dating this Court's decision in *Lampf v. Gilbertson*, ___ U.S. ___, 111 S.Ct. 2773, 2781-82 (1991) apply to this case.

## INTERESTED PARTIES

**PETITIONERS**

MICHAEL K. TOPALIAN, WARREN B. FIENGA, ROY JACOBS, JR., RICHARD OROZCO, JUAN GARCIA-QUIROGA, JEAN STEUBING, CHARLES W. ANDERSON, FRANCIS D. COVERT, RICHARD H. MANUEL, JACK E. BURROUGHS, DON W. BOYETT, BOBBY W. McDONALD, CHARLES F. LACELLE, RICHARD D. MIKLES AND MJM VENTURES, A PARTNERSHIP

**RESPONDENTS**

JOHN N. EHRMAN, EHRMAN INVESTMENT GROUP, INC., W. RODERICK JOHNSON, W. RODERICK JOHNSON, P.C., RICHARD O'DONNELL, HOUSTON PETROLEUM CO., INC., JOEL A. MIDDLEBROOK, JOEL A. MIDDLEBROOK, CPA, VICTOR B. RUSSEK, RUSSEK CO., BERT GAMBLE, RIO BRAVO OIL CO., INC., ROCKWOOD INSURANCE CO. AND ROBERT E. ECKIS, JR.

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JOHN N. EHRMAN, EHRMAN INVESTMENT GROUP, INC., W. RODERICK JOHNSON, W. RODERICK JOHNSON, P.C., RICHARD O'DONNELL, HOUSTON PETROLEUM CO., INC., JOEL A. MIDDLEBROOK, JOEL A. MIDDLEBROOK, CPA, VICTOR B. RUSSEK, RUSSEK CO., BERT GAMBLE, RIO BRAVO OIL CO., INC., ROCKWOOD INSURANCE CO. AND ROBERT E. ECKIS, JR.,

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## PETITION FOR A WRIT OF CERTIORARI

Petitioners TOPALIAN, FIENGA, JACOBS, JR., OROZCO, GARCIA-QUIROGA, STEUBING, ANDERSON, COVERT, MANUEL, BURROUGHS, BOYETT,

McDONALD, LACELLE, MIKLES AND MJM VENTURES, A PARTNERSHIP (TOPALIAN, ET AL.), respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on March 6, 1992.

## OPINIONS BELOW

The opinion of the Court of appeals for the Fifth Circuit is reported at 954 F.2d 1125 (5th Cir. 1992) and is reproduced as **Appendix A, pp. 1-40,** *infra*. The unpublished opinion of the District Court is reproduced at **Appendix C, pp. 44-74,** *infra*.

## JURISDICTION

The judgment of the Court of Appeals was entered on March 6, 1992. See **Appendix A, pp. 1-40,** *infra*. The opinion of the Court of Appeals was corrected on April 28, 1992. See **Appendix B, pp. 41-43,** *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

**Constitution**

The **Seventh Amendment** to the **United States Constitution** provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no

fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

**Preliminary Notes** to **Regulation D, (Rules 501-508)** promulgated pursuant to the **1933 Securities Act, 15 U.S.C. 77a et seq.**, provides, in part:

1. The following rules relate to transactions exempted from the registration requirements of section 5 of the Securities Act of 1933 (the "Act"). Such transactions are not exempt from the antifraud, civil liability, or other provisions of the federal securities laws.

   Issuers are reminded of their obligation to provide such further material information, if any, as may be necessary to make the information required under this regulation, in light of the circumstances under which it is furnished, not misleading.

**Rule 502(c) of Regulation D, 17 C.F.R. 230. 502(c)** provides:

(c) *Limitation on manner of offering.* Except as provided in Rule 504(b)(1), neither the issuer nor person on its behalf shall offer or sell the securities by any form of general solicitation or general advertising, including, but not limited to, the following:

(1) Any advertisement, article, notice or other communication published in any newspaper, magazine, or similar media or broadcast over television or radio; and

(2) Any seminar or meeting whose attendees have been invited by any general solicitation or general advertising.

**Rule 502(d) of Regulation D, 17 C.F.R. 230.502(d)** provides:

> **(d)** ***Limitations on resale.*** Except as provided in Rule 504(b)(1), securities acquired in a transaction under Regulation D shall have the status of securities acquired in a transaction under section 4(2) of the Act and cannot be resold without registration under the Act or an exemption therefrom. The issuer shall exercise reasonable care to assure that the purchases of the securities are not underwriters within the meaning of section 2(11) of the Act, which reasonable care may be demonstrated by the following:
>
> **(1)** Reasonable inquiry to determine if the purchaser is acquiring the securities for himself or for other persons;
>
> **(2)** Written disclosure to each purchaser prior to sale that the securities have not been registered under the Act and, therefore, cannot be resold unless they are registered under the Act or unless an exemption from registration is available; and
>
> **(3)** Placement of a legend on the certificate or other document that evidences the securities stating that the securities have not been registered under the Act and setting forth or referring to the restrictions on transferability and sale of the securities.

While taking these actions will establish the requisite reasonable care, it is not the exclusive method to demonstrate such care. Other actions by the issuer may satisfy this provision. In addition, rules 502(b)(2)(vii) and 504(b)(2)(ii) require the delivery of written disclosure of the limitations on resale to investors in certain instances.

**Section 10(b) of the 1934 Securities Exchange Act, 15 U.S.C. §78(j)** provides:

> **Sec. 10.** It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange –
>
> **(b)** To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

**Rule 10b-5**, promulgated pursuant to **Section 10(b)** of the **1934 Securities Exchange Act, 17 C.F.R. §240.10b-5**, provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> **(a)** To employ any device, scheme, or artifice to defraud,
>
> **(b)** To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> **(c)** To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

**Rule 10b-9(a)** under the **1934 Securities Exchange Act of 1934, 17 C.F.R. §240.10b-9** provides:

> **(a)** It shall constitute a "manipulative or deception device or contrivance", as used in section 10(b) of the Act, for any person, directly or indirectly, in connection with the offer or sale of any security, to make any representation:
>
> > **(1)** To the effect that the security is being offered or sold on an "all-or-none" basis, unless the security is part of an offering or distribution being made on the condition that all or a specified amount of the consideration paid for such security will be promptly refunded to the purchaser unless **(i)** all of the securities being offered are sold at a specified price within a specified time, and **(ii)** the total amount due to the seller is received by him by a specified date; or
> >
> > **(2)** To the effect that the security is being offered or sold on any other basis whereby all or part of the consideration paid for any such security will be refunded to the purchaser if all or some of the securities are not sold, unless the security is part of an offering or distribution being made on the condition that all or a specified part of the consideration paid for such security will be promptly refunded to the purchaser unless **(i)** a specified number of units of the security are sold at a specified price within a specified time, and **(ii)** the total amount due to the seller is received by him by a specified date.

**Section 29(b)** of the **1934 Securities Exchange Act, 15 U.S.C. §78cc(b)**, provides in part:

> **(b)** Every contract made in violation of any provision of this title or of any rule or regulation

thereunder, and every contract (including any contract for listing a security on an exchange) heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this title or any rule or regulation thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule or regulation, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule, or regulation.

**The Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. 1964(c)** provides:

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustained and the cost of the suit, including a reasonable attorney's fee.

**Rule 56(c), Federal Rules of Civil Procedure,** provides:

(c) **Motion and Proceeding Thereon.** The motion shall be served at least **10 days before the time fixed for the hearing.** The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may

be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. (Emphasis ours)

## STATEMENT

### A. Overview and Summary

In this securities fraud and **RICO** case, Respondent-Defendant **JOHN N. EHRMAN (EHRMAN)** and others filed motions for summary judgment ostensibly in order to comply with the district court's scheduling order which imposed a June 15, 1989 motion cut-off date **(App. C, p. 44)**. On July 28, 1989, without the 10-day notice of hearing required by **Rule 56(c), F.R.C.P.**, the court heard summary judgment motions filed by some, but not all, Respondents at a hearing scheduled to discuss discovery problems **(App. H, pp. 89-90)**. Thereafter, at the request of the district court, Respondents **filed** a Pre-Trial Order which, ***inter alia,*** listed **28** issues of contested material facts **(App. E, pp. 77-80)**. Petitioners also filed a Pre-Trial Order which, ***inter alia,*** listed **48** witnesses, 24 of whom were prepared to testify on personal experience as to all phases of their claim that they were defrauded by Respondent **EHRMAN** and others. **(App. A, p. 23)**.

At the time Respondent **EHRMAN** filed his summary judgment motion, he was aware that he was under an intense Securities and Exchange Commission (SEC) investigation based on evidence of record in this case provided by Petitioners. The SEC filed suit against Respondents **EHRMAN** and **GIDEON CHERN** approximately one year later and ultimately obtained permanent injunctive

relief, appointment of a receiver, and an order of restitution for the benefit of Petitioners and other investors on the identical issues involved in this case.

On October 4, 1989, the district court granted all of Respondents' motions for summary judgment **(App. C, pp. 44-74)**, with the exception of the **RUSSEK** Defendants, whose motion the court invited and then granted on December 21, 1989. **(App. D, pp. 75-76).**

The Fifth Circuit Panel held that the statute of limitations commenced to run on November 30, 1984, **"when investors signed subscription agreements."** The lower court held that the subscription agreements signed on that date should have put the investors on notice of the speculative nature of their investment. The investors were put on notice of the risk in the investment but the signing of the agreement did not put them on notice of the fraud that was being and would continue to be perpetrated against them. By Respondents' own admissions, at least five (5) Petitioners did not sign a subscription until after January 10, 1985 **(App. F, p. 82).**

The lower courts also stated that the signing of the subscription agreements constituted investor purchases. Pursuant to the Offering Memorandum, the purchase of the units was to be consummated only if and when the partnership funded. In this case, the partnership funded in late February, 1985 **(App. F, p. 84).** The district court, in its opinion, found that Plaintiffs should have known about the Defendants' alleged misrepresentations by May 1, 1985 **(App. C, pp. 54-56).** Petitioners, who hail from different states, filed their lawsuit on December 3, 1987, seven months after they discovered that they had probably been victims of a ponzi scheme.

The district court was aware at all relevant times prior to entering summary judgment: **1)** that Respondent

**EHRMAN** had not been deposed although Petitioners had attempted to do so on more than six occasions; 2) that Respondent **VICTOR B. RUSSEK's** attorney thought it extraordinary that Respondents were filing summary judgment motions when the principal alleged wrongdoer – **EHRMAN** – had not been deposed; and 3) that other Respondents such as **RIO BRAVO OIL COMPANY, INC.** had candidly admitted that discovery was not completed. However, the district court was willing to proceed since Respondents "were willing to stand on the present posture of the case."

The following are quotes taken from the transcript of the July 28, 1989 Hearing. All statements quoted were made in open court in the absence of Petitioners and their attorney, who were under the mistaken belief that the Hearing was to commence at 10:30 that morning **(App. H, pp. 89-90).**

Transcript, page 3 . . .

THE COURT: **I'M MOST CONCERNED WITH THE FACT THAT THESE DEPOSITIONS NEVER SEEM TO GET COMPLETED, AND THAT THERE IS A CONSTANT RESETTING OF THESE DEPOSITIONS . . . (LINES 16-18)**

**LET ME ASK MR. LOPEZ, IF YOU WILL, TO GIVE ME A REPORT ON WHERE YOU THINK YOU STAND WITH MAKING YOUR CASE; WHAT DISCOVERY REMAINS TO BE DONE, AND WHAT THE SCHEDULE IS FOR THAT DISCOVERY AS FAR AS YOU'RE CONCERNED. (LINES 23-25; PAGE 4, LINE 1)**

Transcript, page 4 . . .

MR. SCHUELER: YOUR HONOR, MR. LOPEZ IS NOT HERE NOR ANY OF THE PLAINTIFFS. (LINES 2-3)

THE COURT: JOYCE, GO GIVE MR. LOPEZ' OFFICE A CALL AND SEE WHERE HE IS. IN THE MEANTIME, THEN START WITH MR. PINEDO. KNOW WHAT SOME OF THE PROBLEMS ARE, FRANK? WHY DON'T YOU JUST SPELL THEM OUT FOR ME?[1] (LINES 13-17)

THE COURT: DO YOU FEEL YOU REALLY HAVE TO HAVE TO COMPLETE YOUR DEFENSE AND ANY OTHER CLAIMS? (LINE 25; PAGE 5, LINE 1)

Transcript, page 5 . . .

MR. F. PINEDO: WELL, YOUR HONOR, WE ARE PREPARED TO GO FORWARD WITH THE CASE AS IT IS RIGHT NOW. WE DO NOT WANT DISCOVERY REOPENED. IF THE COURT FEELS THAT IT'S NECESSARY IN THE INTEREST OF ALL THE PARTIES, WE DO HAVE SEVERAL DEFENDANTS THAT WE WANT TO DEPOSE. BUT WE WOULD RATHER PROCEED, YOUR

---

[1] Frank Pinedo is attorney of record for the EHRMAN Defendants and was "securities" counsel for the Onshore partnership. He was sued by Appellants in their Second Amended Complaint. The court, in an in chambers hearing, proclaimed to all counsel of record that he at one time "worked for Frank." Subsequent to that hearing, the court struck Plaintiffs' amended complaint and later denied Appellants' motion to disqualify Mr. Pinedo.

HONOR, WITHOUT ANY FURTHER DISCOVERY. (LINES 2-8)

MR. SCHUELER: I'D SORT OF LIKE TO GO THROUGH A SUMMARY OF SOME OF THESE THINGS, IF IT IS POSSIBLE, BUT I'M RELUCTANT TO DO IT WITHOUT MR. LOPEZ HERE. (LINES 21-23)

Transcript, page 8 . . .

THE COURT: I ASSUME THAT THERE ARE STILL A NUMBER OF DEPOSITIONS THAT BEGAN AND NEVER GOT COMPLETED, BUT THE DEFENDANTS ARE WILLING TO STAND ON THE PRESENT POSTURE OF THE CASE, IS THAT CORRECT?

MR. F. PINEDO: THAT'S CORRECT, YOUR HONOR. (LINE 25, PAGE 8; LINES 1-4, PAGE 9)

Transcript, page 13 . . .

MR. LEGER: MAY IT PLEASE THE COURT, YOUR HONOR. JOHN LEGER FOR MR. RUSSEK AND RUSSEK COMPANY. I JOIN ECKIS' COUNSEL IN HAVING AN OPPORTUNITY TO FILE ADDITIONAL MOTIONS IN THIS CASE. (LINES 12-15)

ORDINARILY, AS THE COURT KNOWS, YOU COMPLETE YOUR DISCOVERY AND THEN YOU PREPARE WHAT MOTIONS YOU HAVE. BASICALLY, WHAT YOU SEE IS WHAT THE FACTS ARE IN THIS

CASE. AND WE ARE HERE ALMOST 30 DAYS TO TRIAL AND THE PRINCIPAL DEFENDANT HAS NOT BEEN DEPOSED. THAT'S WORKED A HARDSHIP ON ME IN TRYING TO PREPARE THE MOTIONS AND GETTING READY FOR TRIAL BECAUSE WE HAVEN'T FINISHED THE DISCOVERY YET. (LINES 21-25; PAGE 14, LINES 1-2)

IT'S JUST THAT THE DISCOVERY HAS GOTTEN OUT OF DATE AND I WOULD LIKE TO HAVE THAT DONE . . . BEFORE WE CAN HAVE ANY CHANCE OF MAKING VALID MOTIONS AND ARGUMENTS BEFORE THE COURT ABOUT WHAT THE FACTS ARE IN THIS CASE. (LINES 13-17)

Transcript, page 15 . . .

THE COURT: CORRECT ME IF I'M WRONG. A NUMBER OF DEPOSITIONS HAVE AT LEAST PARTIALLY BEEN TAKEN, HAVEN'T THEY?

MR. LEGER: THAT'S CORRECT. . .

THE COURT: BUT MR. EHRMAN'S DEPOSITION HAS NEVER BEEN COMPLETED?

MR. LEGER: HASN'T BEEN STARTED.

THE COURT: HASN'T BEEN STARTED?

MR. F. PINEDO: IT WAS STARTED BRIEFLY, YOUR HONOR, BUT NOT COMPLETED AND POSTPONED . . . (LINES 1-9)

### 1. The District Court's Opinion

The district court based its grant of summary judgment on essentially two grounds – that the applicable limitations period had run and on Respondents' general denials of wrongdoing. The district court's opinion and final judgment with respect to the limitations period were entered prior to the Supreme Court's decision in *Lampf v. Gilbertson*, ___ U.S. ___, 111 S.Ct. 2773, 2781-82 (1991). In view of the recently enacted **Section 27A of the 1934 Securities and Exchange Act, 15 U.S.C. §78(aa) P.L. 102-242, December 19, 1991,** it would appear that the same pre *Lampf v. Gilbertson* case law controls this lawsuit. In granting summary judgment, the district court relied primarily on the following propositions as gleaned from its opinion:

> (1) That the disclaimers in the Offering Memorandum – *which the selling Respondents made available to Petitioners only after they had sold them the securities* – absolutely shielded the **EHRMAN** Respondents and others from any alleged oral or written misrepresentations, omissions, or other securities law violations since "an adult is responsible for reading documents he signs." **(App. C, p. 57; see also App. A, p. 14 n.15).**
>
> (2) That regardless of Petitioners' alleged lack of sophistication or their lack of suitability for the investment, and that despite Respondents' alleged fraudulent high-pressure selling tactics, concealment of fraud, and failure to make truthful disclosures, Petitioners should have known about the Respondents' alleged misrepresentations by May 1, 1985 **(App. C, pp. 54, 56)**, when some Petitioners were just receiving the purported disclosure Memorandum and approximately 4 months after Respondents sold the

securities by means of reconfirmation offers alleged to be in violation of federal law. **(App. F, p. 83).**

**(3)** That even though Petitioners' Civil **RICO** action was timely filed, summary judgment was appropriate **a)** since "there was no evidence of illegality" on Respondents' part **(App. C, pp. 58-59);** and **b)** since Respondents' activities were "all legitimate business practices." **(App. C, p. 58).**

**(4)** That Respondents were deserving of summary judgment on the **RICO** claims since Petitioners did not read the Offering Memorandum "in any depth" or lacked actual knowledge of specific wrongdoing by Respondents at the time Respondents were allegedly committing the unlawful acts in question. **(App. C, p. 61).**

**(5)** The Court's Memorandum assumes – without explanation – that Respondents met their initial burden of showing an absence of evidence to support Petitioners' case, citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Accordingly, its Opinion focuses solely on whether Petitioners proved their case to the same extent they would be required to during the jury trial on the merits. **(App. C, p. 52).**

**(6)** Finally, the Court seems to equate the circumstances of *Celotex Corp. v. Catrett* – a single issue case – with the instant case, which case presents multiple issues of contested facts as to each Plaintiff with respect to each Defendant and the relationship of the Defendants to each other. **(App. C, p. 52).**

### 2. The Court Of Appeals' Affirmance

The Panel decision agreed with every legal proposition set forth in the district court's opinion. **(App. A, pp.**

**1-40).** The Panel's amended decision took the position that **Section 27A of the Securities Exchange Act** did not resurrect Petitioners' claims. **(App. B, pp. 41-43).**

## B. Statement of Background Facts

Petitioners' claims deal with *Onshore Exploration Ltd., 1984 Mid-Year Drilling Program (Onshore),* a Texas oil and gas exploration and development limited partnership. **(App. F, pp. 81-83).** Petitioner/Limited Partners are individual investors from all walks of life and from several states of the United States. Respondent **EHRMAN** and others offered units in the partnership for $30,000.00 per unit. **(App. F, p. 83).** The offering was not registered with the SEC under **Section 5 of the Securities Act of 1933, 15 U.S.C. 77e.** Instead, the Respondent General Partners represented to prospective investors that the offering was exempt from registration under the Commission's **Rule 506 of Regulation D, 17 C.F.R., 230.506,** adopted pursuant to the **Securities Act of 1933.**

It is undisputed that Respondent **EHRMAN** and others sold the units on an all-or-none basis – i.e., if the General Partners did not receive the minimum subscriptions of $2,400,000.00 for the units by December 31, 1984, they were to dissolve the partnership and reimburse the investors **(App. C, pp. 4, 5, 49).** It is also undisputed that the General Partners – Respondents **EHRMAN INVESTMENT GROUP, INC. (E.I.G.)** and **W. RODERICK JOHNSON (JOHNSON)** – did not receive the minimum subscriptions by the termination date and, thus, were required to dissolve Onshore and refund Petitioners and the other investors. However, instead of dissolving the

partnership, Respondent **EHRMAN** and others re-offered the Securities to Petitioners in January, 1985 by use of a reconfirmation letter and attached documents indicating that the units were worth $43,682.00. It is also undisputed that Respondents did not contemporaneously supply Petitioners with any disclosure materials required by law when they re-offered the Securities subsequent to the Offering's Termination Date. **(App. F, p. 83).**

Additionally, Petitioners alleged that the evidence of record indicated that the Respondent General Partners and others sold the units: **a)** through impermissible general solicitations and group seminars which Respondent **JOEL A. MIDDLEBROOK (MIDDLEBROOK)** spontaneously referred to as "dog-and-pony shows" **(App. G, p. 87); b)** to individuals on the verge of bankruptcy; c) to persons who could not afford to purchase units; and **d)** to other unsuitable or unsophisticated investors by making extravagant and fraudulent promises relative to the investment. The record also showed that Respondents created a public secondary market for the Securities by continually authorizing secondary sales of the units which resulted in the sale of Onshore Securities to some Petitioners as late as January, 1986.

It was public knowledge that Respondent **EHRMAN's** alleged wrongful conduct in Onshore and both prior and ensuing offerings embraced the same or similar purposes, results, participants, victims and methods of commission, were interrelated by distinguishing characteristics and were not merely the product of isolated events. Such conduct continued until the SEC obtained permanent injunctive relief in June 1990, corroborating

Petitioners' allegations regarding violations of the Civil RICO statute, 18 U.S.C. 1964 (c).

## REASONS FOR GRANTING THE WRIT

### I. THE FIFTH CIRCUIT PANEL'S UNPRECEDENTED HOLDING, THAT DISCLAIMERS IN AN OFFERING MEMORANDUM SERVED TO ABSOLUTELY SHIELD RESPONDENTS FROM ALL CHARGES OF SECURITIES FRAUD REGARDLESS OF THE CIRCUMSTANCES, IS IN DIRECT CONFLICT WITH THE LAW OF EVERY CIRCUIT, INCLUDING THE FIFTH, AND IS ALSO AT ODDS WITH SUPREME COURT PRECEDENT

No federal appellate court has held, until now, that an investor is precluded from recovering under Rule 10b-5, 17 C.F.R. §240.10b-5, if the misrepresentations upon which the investor relied were oral and conflicted in some way with contemporaneous written representations available to the investor. On the contrary, determination of whether an investor's reliance is justified requires consideration of all relevant factors, including 1) the sophistication and expertise of the plaintiff in financial and security matters; 2) the existence of longstanding business or personal relationships between the plaintiff and the defendant; 3) the plaintiff's access to relevant information; 4) the existence of a fiduciary relationship owned by defendant to the plaintiff; 5) concealment of fraud by the defendant; 6) whether the plaintiff initiated the stock transaction or sought to expedite the transaction; and 8) the generality or specificity of the misrepresentations. *Bruschi v. Brown*, 876 F.2d 1526, 1529 (11th Cir. 1989); *Kennedy v. Josephthal & Co.*, 814 F.2d 798, 804 (1st Cir. 1987); *Zobrist v. Coal-X, Inc.*, 708 F.2d 1511, 1516 (10th

Cir. 1983); *G.A. Thompson & Co. v. Partridge*, 636 F.2d 945, 955 (5th Cir. 1981); *Nye v. Blyth Eastman Dillon & Co.*, 588 F.2d 1189, 1197 (8th Cir. 1978); *Straub v. Vaisman & Co.*, 540 F.2d 591, 598 (3rd Cir. 1976); *Hughes v. Dempsey-Tegeler & Co.*, 534 F.2d 156, 176-77 (9th Cir.), *cert. denied*, 429 U.S. 896 (1976). No single factor is dispositive; all must be considered in determining whether reliance was justified. *Bruschi v. Brown, supra*, 876 F.2d at 1529, *citing Zobrist v. Coal-X, Inc.*, 708 F.2d at 1516-17.

Applying the above factors to this case, it is clear that the Panel erred as a matter of law in holding that disclaimers in the Offering Memorandum absolutely shielded the **EHRMAN** Respondents and others from liability for the numerous oral and written misrepresentations made to Petitioners.

The Supreme Court has repeatedly stated that the fundamental purpose of the **1934 Act** is "to substitute a philosophy of full disclosure for the philosophy of **caveat emptor** . . . " *Santa Fe Industries v. Green*, 430 U.S. 462, 477 (1977), *citing Affiliated Ute Citizens v. United States*, 406 U.S. 128, 151 (1972), *quoting SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 186 (1963). Moreover, the Supreme Court has made clear that the statute "must be read flexibly, not technically and restrictively" and that it "provides a cause of action for any plaintiff who suffer[s] an injury as a result of deceptive practices touching the sale [or purchase] of securities . . . " *Santa Fe Industries, supra*, 430 U.S. at 475-76, *citing Superintendent of Insurance v. Bankers Life & Gas Co.*, 404 U.S. 6, 12-13 (1971).

In *Hilgeman v. National Ins. Co. of America*, 547 F.2d 298, 302 (1977), the Fifth Circuit recognized that **Rule 10b-5**, among other things, broadly prohibits any person from employing a "device, scheme or artifice to defraud"

or from engaging in "any act, practice or course of business which operates as a fraud or deceit upon any person." *Id.* at 302, *citing* **17 C.F.R. § 240.10b-5(a)** and **(c)**. Furthermore, the Fifth Circuit in *Isquith v. Middle South Utilities, Inc.*, 847 F.2d 186, 200 n.8, 201 (5th Cir.), *cert. denied*, 109 S.Ct. 310, (1988) made clear "that how information is disclosed, as distinguished from what information is disclosed, can lead to liability under . . . **Rule 10b-5**, promulgated pursuant to **Section 10(b) of the 1934 Act.**" *Id.* at 200.

In this case, the Panel's holding conflicts with the philosophy underlying the federal securities laws and the unanimous weight of authority. If allowed to stand, the decision will encourage fraud and impede private enforcement of the federal securities laws.

## II. THE PANEL'S HOLDING THAT ALL PETITIONERS SHOULD HAVE KNOWN ABOUT RESPONDENTS' ALLEGED SECURITIES FRAUD BY MAY 1, 1985 DIRECTLY CONFLICTS WITH THE LEADING FIFTH CIRCUIT CASE AS WELL AS THE CASE LAW OF EVERY CIRCUIT TO HAVE CONSIDERED SIMILAR CASES.

The district court's fixing of a date when all Petitioners knew or should have known of the wrongs committed by the Defendants was the *identical error* made by the district court in *Azalea Meats, Inc. v. Muscat*, 386 F.2d 5, 9 (5th Cir. 1967). The effect of such factually unfounded conclusions is to deprive Petitioners of their right to a trial by jury on the facts. *See Azalea, supra*, at 9. Petitioners' Complaint and other documents alleged facts which clearly showed the limitations period had not run as to any of the Plaintiffs under **Section 12(1)** and **12(2) of the 1933 Act** or under **Rule 10b-5.**

Petitioners presented controverting evidence on these points in their response to Respondent **EHRMAN's** Motion for Summary Judgment. Moreover, since the **EHRMAN** Respondents and their seller-agents were continually authorizing secondary offers and sales of the Securities to an unsuspecting public, in violation of **Rule 502(d) of Regulation D,** the unlawful "Ponzi Scheme" arguably never stopped. Petitioners are entitled to have a jury trial on the issues of the **EHRMAN** Respondents' fraudulent concealment of the truth, their active misrepresentations and the date when each Petitioner discovered, or, in the exercise of reasonable diligence, should have discovered the violations charged in this complex securities fraud case.

In a recent case very similar to this one, the Eleventh Circuit held that "summary judgment is appropriate where no reasonable jury could differ as to whether the plaintiffs exercised due diligence in discovering the fraud." *Durham v. Business Management Associates,* 847 F.2d 1505, 1509-1510 (11th Cir. 1988). In upholding the denial of summary judgment, the Eleventh Circuit quoted liberally from the Fifth Circuit's decision in *Azalea Meats, Inc., supra,* 386 F.2d at 9. *See Durham, supra,* 847 F.2d at 1509. Other Circuits have taken similar approaches. *See, e.g., Robertson v. Seidman & Seidman,* 609 F.2d 583, 589, 593 (2nd Cir. 1979); *Schaefer v. First National Bank,* 509 F.2d 1287, 1298 (7th Cir. 1975), *cert. denied,* 425 U.S. 943 (1976).

This is a classic case demanding reversal of the Panel's decision; it involves multiple Plaintiffs from all parts of the United States who were lured into a "Ponzi Scheme" designed to benefit those who participated in the scheme. The trial court's pronouncement of a date

when *each* Petitioner should have known of the alleged wrongdoing is not only erroneous on the factual record but has deprived each Petitioner of his Seventh Amendment right to a jury trial on admittedly contested issues of fact. *See, generally, Baltimore and C. Line, Inc. v. Rodman,* 295 U.S. 654, 657 (1935); *Ross v. Bernhard,* 396 U.S. 531 (1970); see also **App. E, pp. 77-80.**

To allow the Panel's decision to stand will frustrate the rights of securities fraud victims who have been duped by unscrupulous financiers who artfully conceal their wrongdoing.

## III. THE FIFTH CIRCUIT PANEL'S APPLICATION OF SUMMARY JUDGMENT STANDARDS IS IN DIRECT CONFLICT WITH FIFTH PRECEDENT, THE PRECEDENT OF OTHER CIRCUITS, CLASHES WITH CONTROLLING SUPREME COURT CASE LAW GOVERNING SUMMARY JUDGMENT, AND THREATENS TO SEVERELY UNDERMINE THE CLEAR CONGRESSIONAL PURPOSE UNDERLYING THE SECURITIES LAWS AND THE RICO STATUTE.

### THE SECURITIES LAW CLAIMS

Respondents' motions for summary judgment were based on two grounds – that the statute of limitations had run and general denials of wrongdoing. The **EHRMAN** Respondents, at the trial level, offered evidence which purportedly showed that some, but, admittedly not all, of Petitioners' claims were time barred.[2] Petitioners

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[2] In their motion for summary judgment, the **EHRMAN** Defendants admitted that Petitioners **JEAN STEUBING,**

(Continued on following page)

presented controverting evidence from: **a) EHRMAN'S** *Motion for Summary Judgment;* **b)** a February 23, 1988 Affidavit by **EHRMAN** (Exhibit 1 to Plaintiffs' Response to **EHRMAN'S** *Motion for Summary Judgment);* **c)** a June 14, 1989 Statement and Affidavit (Exhibits 2 and 3 in Plaintiffs' Response); **d)** excerpts from another of **EHRMAN'S** pleadings (Exhibit 4); **e)** a February 17, 1988 Affidavit by Wayne M. Byles (Exhibit 5); **f)** excerpts from Mr. Byles' deposition (Exhibit 6); and **g)** excerpts from the September 30, 1984 Offering Memorandum (Exhibit 7). The foregoing clearly demonstrate that Petitioners responded with more than mere generalities. They set forth specific facts and presented documentary evidence in controverting Defendants' assertions and in establishing a genuine issue worthy of trial.

Nevertheless, the Panel's decision states that Petitioners did not challenge the district court's findings with specific evidentiary material pulled from the record. The implication is made that Petitioners should have presented their own affidavits as competent summary judgment evidence. However, in *Isquith v. Middle South Utilities, Inc.*, 847 F.2d 186, 197-200 (5th Cir.), *cert. denied*, 109 S.Ct. 310 (1988), the Fifth Circuit made clear that non-movants need not always attach affidavits or summary judgment evidence of their own to support their position; the non-movant need only "show the district court, by

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(Continued from previous page)

**RICHARD MIKLES, MJM VENTURE, CHARLES F. LACELLE and MICHAEL K. TOPALIAN** purchased their units *on or after January 10, 1985.* They claimed the statute of limitations had run as to any investor who signed an agreement on or before December 7, 1984, three (3) years prior to the filing of Petitioners' lawsuit.

pointing to evidence in the record, that the movant has failed to sustain its initial burden." *Isquith, supra,* 847 F.2d at 199, *citing Celotex v. Catrett,* 477 U.S. at 332 (Brennan, J., dissenting on other grounds). The Fifth Circuit emphatically stated that "where the movant attaches summary judgment evidence which *supposedly* demonstrates that, as a matter of law, the movant must prevail on an element of the non-movants' claim, the non-movant should be able to answer the motion by arguing that the evidence raised a fact issue, which must be resolved at trial, concerning the element." *Isquith, supra,* at 847 F.2d at 199.

Furthermore, the Fifth Circuit held:

> **Not one of the cases holds – or even implies – that unless a non-movant files its own evidentiary materials, the non-movant is 'resting upon the allegations of its own pleadings'. Nor would such an implication be proper; if a non-movant points to record evidence which the movant used to support its claim to summary judgment, the non-movant has necessarily gone beyond the mere allegations of its pleadings.**

*Id.,* at 199. Thus, it is clear that Respondents **EHRMAN, Et Al.,** the trial court and the Panel here, like the trial court in *Isquith,* "misperceived the burden on a party attempting to resist summary judgment." *Isquith, supra,* at 197. Here, Petitioners have repeatedly attacked the purported evidence of the Movants as itself creating countless issues of fact. Each Respondent's argument is simplistic and conclusory. All state they did nothing wrong and, as a last resort, they argue that the evidence conclusively shows that the statute of limitations has run despite the countless fact issues involved in that determination.

In *International Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 936 (1992), the Fifth Circuit, *citing Isquith*, held that a non-moving party can defeat a motion for summary judgment by demonstrating that evidence tendered by the moving party is itself laced with contradictions of fact. *International Shortstop, supra*, 939 F.2d at 1263-64. It is clear that, in this case, the Panel made no attempt to consider the entire record in a light most favorable to the non-moving party, the Petitioners here, as required by well established precedent, *International Shortstop*, 939 F.2d at 1264.

The moving party Respondents had the initial burden of affirmatively showing the non-existence of a "genuine issue" as to "any" material fact which would entitle them to judgment as "a matter of law". *Celotex Corp v. Catrett*, 477 U.S. 317, 323 (Majority) 328 (White, Concurring) 330 (Brennan, dissenting on other grounds). A conclusory assertion that the non-moving party has no evidence is insufficient where the record discloses, as it does in this case, that the moving party has overlooked even one witness who would provide relevant testimony for the non-moving party at trial. A court cannot find that the moving party has discharged its initial burden of production unless the moving party has sought to demonstrate the inadequacy of the witness' testimony. Absent such a demonstration, summary judgment must be denied on the grounds that the moving party has failed to meet its burden of production under **Rule 56.** *Celotex Corp. v. Catrett, supra*, 477 U.S. at 328 (White, concurring), 322-333 (Brennan, dissenting on other grounds). Here, Petitioners' detailed Pre-Trial Order listed 48 witnesses, **24** of whom were ready to testify as to each of the **28**

issues of fact listed by Respondents in their Pre-Trial Order. **(App. E, pp. 77-80).**

Respondents never met their "initial responsibility" of "Identifying those portions of [the record] which . . . demonstrate the *absence* of a genuine issue of material fact." *Celotex Corp. v. Catrett, supra,* 477 U.S. at 323 (Majority) (emphasis ours). Instead, after filing their summary judgment motions, some at the invitation of the Court, Respondents subsequently filed a Pre-Trial Order in which they candidly acknowledged the existence of no less than **28** contested issues of material fact and made numerous admissions of fact as well. **(App. E, pp. 77-80).** *See, Generally, Overview and Summary, supra.* As incredible as it may seem, at the invitation of the Court on August 28, 1989, the **RUSSEK** Defendants filed a Motion for Summary Judgment (October 30, 1989) after they had filed their Pre-Trial Order, wherein they, too, cited the **28** issues of contested material facts. It is undisputed that the court required the Pre-Trial Order to be filed and that Petitioners and Respondents did so.

## THE RICO CLAIM

Equally erroneous is the Panel's treatment of Petitioners' **RICO** claims. At the request of the trial court, Petitioners filed a lengthy **RICO** case statement explaining in detail the basis of the **RICO** charges. Petitioners clearly set forth their financial injuries as a result of various predicate acts, including violations of **Section 10b** of the **1934 Securities Exchange Act** and Federal mail and wire statutes. Petitioners carefully outlined "acts (on the part of Respondents) that have the same or similar purposes, results, participants, victims, or methods of

commission," and that are otherwise "interrelated by distinguishing characteristics." *Sedima, S.P.R.L. v. Imrex Company, Inc.*, 473 U.S. 479, 496 at n.14 (1985) *Accord: H.J. Inc. v. Northwestern Bell Telephone Co.*, 109 S.Ct. 2893, 2901 (1989).

Accordingly, it is clear that the district court's grant of summary judgment to all Defendants on Plaintiffs' **RICO** claims and the Panels' affirmance based on Respondents' conclusory assertions of no wrongdoing were impermissible error.

## IV. THE RECORD MAKES CLEAR THAT RESPONDENTS EHRMAN AND OTHER MOVING PARTIES KNEW THAT MATERIAL FACTUAL DISPUTES EXISTED WHEN THEY FILED THEIR SUMMARY JUDGMENT MOTIONS – MUCH LIKE THE MOVING PARTIES IN *GOKA V. BOBBITT*, 862 F.2d 646, 650 (7TH CIR. 1988), AND INTENDED TO "RAILROAD" PETITIONERS THROUGH AN ILLEGITIMATE AND PREMATURE MOTION FOR SUMMARY JUDGMENT

At the time Respondent **EHRMAN** filed his Motion for Summary Judgment, he was well aware that he was under an intense Securities and Exchange Commission investigation and that Petitioners were supplying the information. The SEC, based on affidavits provided by Petitioners and Plaintiffs in a related case, ultimately obtained the result Petitioners would have easily achieved had this case gone to trial – i.e., the liquidation of the partnerships and the appointment of a receiver.

The cases cited by Respondents in order to minimize their candid acknowledgement of at least 28 contested issues of material fact in this case – and erroneously relied on by the Panel – are of no help to them. In *Irving*

*Trust Company v. United States*, 221 F.2d 303, 305 (1955), the Second Circuit noted that there was "no dispute as to the underlying facts" in that case. Here, there are serious disputes as to the underlying facts, unlike the scenario panted in *Irving Trust*. Similarly, the case of *Taylor v. Allis-Chalmers Manufacturing Co.*, 320 F.Supp. 1381 (E.D. Pa. 1969) involved a starkly different situation than the one here – plaintiffs in that case had a jury trial on the merits. That case focused on the use of the pretrial order during the course of trial. In this case, however, there was never a trial on the merits despite Respondents' acknowledgement of 28 contested issues of material facts. Additionally, and contrary to the Panel's statement, it is undisputed that the district court required that the Pre-Trial Orders be filed and that they were, in fact, filed.

In *Goka v. Bobbitt*, 862 F.2d 646, 650 (7th Cir. 1988), the Seventh Circuit held:

> **When a party has obtained knowledge through the course of discovery, or otherwise, that a material factual dispute exists and yet proceeds to file a summary judgment motion in hopes that the opposing party will fail or be unable to meet its burden in responding to the motion, he defeats that purpose; and, more important, violates the rules of procedure which govern the conduct of trial, specifically Rule 11.**

That is the case here. Indeed, at least one Respondent thought it extraordinary that the district court was even entertaining motions for summary judgment given the Court's knowledge that Respondent **EHRMAN** had evaded being deposed. Other Respondents candidly admitted that discovery had not been completed. See generally, Overview and Summary, *supra*, pp. 10-13.

Unlike the non-movant in *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986), Petitioners have consistently made a "serious claim" that they were "railroaded" by premature motions for summary judgment which were patently unjust.

## V. THE RECENTLY ENACTED SECTION 27A OF THE 1934 SECURITIES EXCHANGE ACT REQUIRES THAT PRE *LAMPF V. GILBERTSON* CASE LAW BE APPLIED TO THIS CASE

On December 19, 1991, the **Federal Deposit Insurance Corporation Improvement Act of 1991** became effective. **Subtitle M, Section 476 of the Act** has, as its intended effect, the retroactive overturning of this Court's decision in *Lampf v. Gilbertson*, 111 S.Ct. 2773 (1991). The new provision appears as Section 27A (a) and (b) of the 1934 Securities Exchange Act, as amended. **(App. B, p. 42).**

Section 27A, 15 U.S.C. 78 (aa), subsection (a) makes clear that that provision applies to "*any* private civil action . . . under section 10(b) . . . that was commenced on or before June 19, 1991 . . . " and which is currently pending. The statute, on its face, is clearly not limited to cases pending in a trial court. Accordingly, the Act only requires that the same legal standards relative to the statute of limitations which existed on June 19, 1991 be utilized. Those standards are the ones which the district court and the Panel erroneously missapplied in this case.

Accordingly, to the extent that the Panel's opinion, as amended, suggests that the limitations period is based on *Lampf*, it is incorrect. In any event, as already pointed out, it is clear that the lower court committed legal error

in its ruling regarding the running of the limitations period.

## CONCLUSION

The Petition for Writ of Certiorari should be granted. The error of the lower courts is manifest and threatens to seriously undermine all private suits to enforce the federal securities laws; therefore, the Court may also wish to consider summary reversal of the lower court's opinions and order a trial on the merits. A reversal of the district court's grant of summary judgment would also require a reversal of the court's grant of summary judgment to Onshore and Defendants **E.I.G.** and **ROCKWOOD INSURANCE CO.** on their counter-claims against certain Plaintiffs.

Respectfully submitted,

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## APPENDIX A

**Michael K. Topalian, Don W. Boyett, Bobby W. McDonald, MJM Ventures, Richard H. Manuel, Jack E. Burroughs and Charles W. Anderson, Plaintiffs-Appellants,**

**v.**

**John N. Ehrman, Rockwood Insurance Company, et al., Defendants-Appellees.**

**Michael K. Topalian, Warren B. Fienga, Richard H. Manuel, Don W. Boyett, Bobby W. McDonald, Charles F. Lacelle and MJM Ventures, Plaintiffs-Counter Defendants-Appellants,**

**v.**

**John N. Ehrman, Etc., et al., Defendants,**

**Ehrman Investment Group, Inc., Defendant-Counter Plaintiff-Appellee,**

**and**

**Onshore Exploration Ltd. 1984 Mid-Year Drilling Program, Counter Plaintiff-Appellee.**

**Michael K. Topalian, et al., Plaintiffs-Appellants,**

**v.**

**John N. Ehrman, Individually, Etc., et al., Defendants-Appellees.**

**Nos. 90-2104, 90-2105 and 90-2106.**

United States Court of Appeals,
Fifth Circuit

March 6, 1992.

Investors in oil and gas limited partnership brought action against general partners under federal securities

statutes and Racketeer Influenced and Corrupt Organizations Act (RICO). The United States District Court for the Southern District of Texas, Norman W. Black, J., entered summary judgment in favor of general partners, and investors appealed. The Court of Appeals, Emilio M. Garza, Circuit Judge, held that: (1) investors' securities claims were barred by limitations, and (2) investors' allegations were insufficient to state RICO claim.

Affirmed.

Appeals from the United States District Court for the Southern District of Texas.

Before DUHÉ, WILLIAMS, and GARZA, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

Onshore Exploration Ltd. ("Onshore") is a Texas limited partnership formed to engage in oil and gas drilling ventures. On December 3, 1987, plaintiffs – fifteen out of seventy-seven Onshore investors – brought this action against twenty-three defendants.[1] Plaintiffs, alleging that they suffered damages as a result of the offer and sale to them of limited partnership interests in Onshore and that they are the victims of a conspiracy in which all defendants participated, sought damages under:

> (i) sections 12(1) and 12(2), 15 and 17(a) of the Securities Act of 1933, as amended [15 U.S.C. §§ 77*l*(1)-(2), 77*o*, 77q(a) (1989)];

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[1] This action has spawned two sets of related counterclaims, and the case before this court is actually a consolidation of three related actions. *See infra* note 9.

(ii) section 10(b) of the Securities Exchange Act of 1934, as amended [15 U.S.C. § 78j(b) (1989)] and Rule 10b-5 thereunder (17 C.F.R. § 240.10b-50);

(iii) the Racketeer Influenced and Corrupt Organization Act (RICO) 18 U.S.C. § 1964(c) (1989)];

(iv) the Texas Securities Act [Tex.Rev.Civ.Stat.Ann., art. 581-33 (West Supp. 1987)]; and

(v) common law fraud and deceit, breach of fiduciary duty and "other conduct alleged to be in violation of the laws of the State of Texas."[2]

The district court, finding no material fact issues in dispute, granted defendants' motion for summary judgment. Plaintiffs now appeal from that judgment seeking:

(i) reversal of the district court's summary judgment in favor of defendants;

(ii) removal to a new court; and, ultimately,

(iii) rescission of the transactions resulting in purchase of investment units;

(iv) treble damages under RICO;

(v) imposition of a constructive trust;

(vi) appointment of a receiver;

(vii) costs and attorney's fees; and

(viii) "other relief as may be just and proper."

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[2] Not all defendants are alleged to have violated all of these laws.

Concluding that plaintiffs have failed to set forth specific facts and establish a genuine issue worthy of trial, we affirm the district court's summary judgment in favor of defendants.

## I

### A

Onshore was formed in September 1984 under Texas law for the purpose of raising funds for oil and gas drilling ventures. The enterprise was presented to potential investors as a tax shelter and a sound, legitimate investment vehicle. On September 26, 1984, Onshore entered into a Joint Venture Agreement with Defendant Houston Petroleum Company ("HPC"), Onshore agreeing to use its best efforts to raise a minimum subscription of $3,600,000 in capital contributions on or before October 31, 1984.

The defendants, general partners of Onshore, decided to raise this 3.6 million dollars by selling limited partnership units. Onshore actively began to solicit investors in November 1984. According to plaintiffs, Onshore's general partners represented to prospective investors that the Onshore offering was exempt from registration under the Security and Exchange Commission's Rule 506 of Regulation D. *See* 17 C.F.R. § 230.506 (1989).[3] This Rule

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[3] Offerings made to credited investors and pursuant to Regulation D are exempt from the registration requirements of section 5 of the Securities Act of 1933. *See* 15 U.S.C. § 77e (1989). It is undisputed that the Onshore offering was not registered with the SEC under section 5.

506 exemption to the registration requirements of section 5 of the Securities Act of 1933 is limited to offering made to *not more than 35 non-accredited investors. See id.* Although the Onshore offering was made primarily to accredited investors, defendants and their seller-agents allegedly offered and sold the Onshore securities to more than 35 non-accredited investors.

In their effort to obtain adequate financing, defendants printed at least two different offering memoranda, one dated September 30, 1984 and another dated November 30, 1984.[4] The November 30, 1984 memorandum stated that the offering termination date – the date by which the partnership needed to raise a minimum subscription of $3,600,000 in capital contributions – was December 31, 1984.[5] As that deadline approached, defendants were short of the minimum subscriptions required to continue the partnership. Rather than dissolving the partnership and reimbursing the limited partners as promised in the original offering memoranda, in January 1985 Onshore forwarded a document to each investor

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[4] Investors were given the option of subscribing to an Onshore unit by either paying cash or by executing a promissory note for the full amount of their subscriptions. A total of 77 investors bought the units, including fourteen of the fifteen plaintiffs.

[5] The offering termination date was actually October 31, 1984 "unless the subscription is extended for up to two additional one-month periods. . . . " Appellants' Record Excerpts at tab 13, *Topalian v. Ehrman*, Nos. 90-2104, 90-2105, 90-2106 (5th Cir. filed Oct. 24, 1990) (Onshore Exploration Ltd. 1984 Mid-Year Drilling Program) ["Appellants' Record Excerpts"].

who had subscribed on or before December 31, 1984 which permitted each subscriber to rescind or affirm her respective purchase of Onshore interests. To compensate for Onshore's subscription deficiency, the general partners then allegedly decided to pledge the limited partners' promissory notes as security for a bank loan made to Onshore by Interdiscount Ltd. ("IDL") and guaranteed by Ehrman Investment Group, Ltd. ("EIG").[6] These loan proceeds were allegedly spent financing the Onshore venture.

B

Plaintiffs filed their original complaint on December 3, 1987. On December 18, 1987, they filed their first amended complaint, alleging that, with the help of others, Onshore's general partners – E.I.G. and W. Roderick Johnson – engaged in a scheme to defraud them in the sale of Onshore limited partnership securities.

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[6] Six of the plaintiffs defaulted on promissory notes executed to finance their subscriptions. EIG (guarantor on payment of the loan made to Onshore by IDL) has been sued by Rockwood Insurance Company ("Rockwood") – a firm that issued investor bonds insuring the payment of the promissory notes used to finance Onshore – as a result of the default of several investors, including these six plaintiffs. EIG and Onshore filed counterclaims seeking payment of the amount due on these notes by these plaintiffs. Also, defendant Rockwood filed a counterclaim against seven of the plaintiffs seeking a money judgment on promissory notes and indemnification agreements, and EIG and Onshore have filed another counterclaim against plaintiff Warren Fienga ("Fienga"), who defaulted on a cash call when he stopped payment of his $8,000.00 check to Onshore.

Defendants filed motions to dismiss, and, with the exception of claims brought under section 17 of the Securities Act of 1933, the district court denied these motions. Plaintiffs were directed to amend their complaint to specifically refer to the defendants against whom allegations were being made and comply with the court's RICO standing order. Discovery commenced. In August 1988, plaintiffs filed their Second Amended Complaint, which the district court struck.[7] In September 1988, plaintiffs filed a Motion for Leave to File a Second Amended Complaint or in the Alternative Motion for Joinder of Persons Needed for Just Adjudication. In October 1988, the district court held a pre-trial conference on matters including this motion – a motion the district court ultimately denied.

In January 1989, the court considered a joint motion to amend the scheduling order of August 1988, and extended the discovery cut-off date to April 1989. At this January hearing, the court admonished all counsel to cooperate in discovery and reserved a ruling on pending motions for sanctions. The court set July 28, 1989 for the hearing and disposition of pending motions.

Defendants filed motions for summary judgment on June 15, 1989. Although responses to these motions were due on July 10, 1989, plaintiffs did not file their responses until July 27, 1989. Plaintiffs were also late in filing their motions for summary judgment. In October 1989, the

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[7] The district court struck plaintiffs' Second Amended Complaint, which was some 185 pages and 630 paragraphs long, because plaintiffs failed to obtain leave of court, as required by Rule 15(a) of the Federal Rules of Civil Procedure.

district court granted summary judgment in favor of the Ehrman defendants and against plaintiffs. In December 1989, the district court first granted summary judgment in favor of EIG, Onshore, and Rockwood on their counterclaims against certain plaintiffs. Later that same month, the district court entered its final judgment, granting summary judgment to all the remaining defendants. The district court also held a hearing on pending motions for sanctions and granted defendants' motion for sanctions against some of the plaintiffs and against their counsel, Mr. Armando Lopez.

II

Plaintiffs seek reversal of the district court's grant of summary judgment, and they have pinned a tail of reversible-error assertions to this summary judgment challenge.[8] Defendants deny plaintiffs' allegations, and they allege that even if the facts were true, plaintiffs' causes of action are time-barred by (i) the one and three-year statutes of limitations applicable to claims brought under the Securities Act of 1933, (ii) the two-year statute of limitations applicable to claims under the Securities Exchange Act of 1934, and (iii) the fact that plaintiffs failed to state a claim under RICO. Some of the defendants deny participating in the offer and sale of the units,

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[8] Ultimately, they seek much more – rescission of the transactions which resulted in the purchase of the units, treble damages under RICO, imposition of a constructive trust, appointment of a receiver, costs and attorney's fees, and "other relief as may be just and proper."

and they further deny that they had any fiduciary or other duty to any of the plaintiffs.

This case is the product of consolidation.[9] We have diligently sorted through the numerous bundles of issues the parties have toted before us, and our efforts have resulted in six groupings:

(a) Did the district court err in granting defendants' motions for summary judgment?

(b) Did the district court err in granting defendants' motions for summary judgment on the counterclaims against plaintiffs?

(c) Did the district court err in denying plaintiffs' Motion to File a Second Amended Complaint or, in the Alternative, a Motion for Joinder of Persons Needed for Just Adjudication?

(d) Did the district court dismiss IDL as a party solely as a Rule 11 sanction to punish plaintiffs for allegedly filing a frivolous claim and, if so, is the district court in contempt of the Fifth Circuit's mandate to reinstate IDL as a party?

(e) If this court should reverse the district court, is there sufficient evidence in the record to justify reassignment of this case to another judge?

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[9] The case is actually a conglomeration of three cases on appeal, *Topalian v. Ehrman & Rockwood Ins. Co.*, No. 90-2104 (5th Cir.); *Topalian v. Ehrman & Ehrman Investment Group*, No. 90-2105 (5th Cir.); *Topalian v. Ehrman*, No. 90-2106 (5th Cir.). The record consists of some 323 docket entries.

(f) Should this court grant Rockwood's Motion for Sanctions?

A & B

1

Since this case is an appeal from a grant of summary judgment, this court reviews the record de novo. *See International Shortstop, Inc. v. Rally's*, 939 F.2d 1257, 1263 (5th Cir.1991). Our inquiry as to whether the district court properly granted summary judgment in defendants' favor is guided by Rule 56 of the Federal Rules of Civil Procedures and three Supreme Court cases. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2550, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 2505-14, 91 L.Ed.2d 202 (1986); *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

Summary judgment is proper if the movant demonstrates that there is an absence of genuine issues of material fact. *See Anderson*, 477 U.S. at 248, 106 S.Ct. at 2510. Such a showing entitles the movant to summary judgment as a matter of law. *See* Fed.R.Civ.P. 56(c). The movant accomplishes this by informing the court of the basis for its motion, and by identifying portions of the record which highlight the absence of genuine factual issues. *See generally id.* Once the movant produces such evidence, the nonmovant must then direct the court's attention to evidence in the record sufficient to establish that there is a genuine issue of material fact for trial – that is, the nonmovant must come forward with evidence establishing each of the challenged elements of its case

for which the nonmovant will bear the burden of proof at trial. *See Catrett*, 477 U.S. at 322, 106 S.Ct. at 2552.

The nonmovant can satisfy its burden by tendering depositions, affidavits, and other competent evidence to buttress its claim. *See Rally's*, 939 F.2d at 1263; *see also* Fed.R.Civ.P. 56(e). Mere conclusory allegations are not competent summary judgment evidence, and they are therefore insufficient to defeat or support a motion for summary judgment. *See Galindo v. Precision American Corp.*, 754 F.2d 1212, 1216 (5th Cir.1985); *United States v. An Article of Drug*, 725 F.2d 976, 984-85 (5th Cir.1984). Nor may plaintiffs rest upon mere allegations made in their pleadings without setting forth specific facts establishing a genuine issue worthy of trial. *See Anderson*, 477 U.S. at 248-49, 106 S.Ct. at 2510; *C.F. Dahlberg & Co., Inc. v. Chevron U.S.A., Inc.*, 836 F.2d 915, 920 (5th Cir.1988). In reviewing a grant of summary judgment to determine whether the law was applied correctly, this court only considers papers that were before the trial court.[10] *See*

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[10] This court's inquiry is limited to the summary judgment record before the trial court: the parties cannot add exhibits, depositions, or affidavits to support their positions on appeal, nor may the parties advance new theories or raise new issues to secure reversal. *See Munoz v. International Alliance of Theatrical Stage Employees*, 563 F.2d 205, 209 (5th Cir.1977); *see generally* CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2716 at 651-54 (Civil 2d. vol. 10 1983). Facts not presented at trial cannot be asserted on appeal. *Garcia v. American Marine Corp.*, 432 F.2d 6, 8 (5th Cir.1970) ("Any action on appeal can be properly based only on matters considered at trial: . . . [a] court may not therefore, reverse [summary judgment] on the basis of facts not in the record").

Nissho-IWAI American Corp. v. Kline, 845 F.2d 1300, 1307 (5th Cir.1988). Moreover, this court cannot decide disputed issues of material fact. *Id.*[11] Summary judgment is appropriate, therefore, if the nonmovant fails to set forth specific facts, by affidavits or otherwise, to show there is a genuine issue for trial. *See Marsh v. Austin-Fort Worth Coca-Cola Bottling Co.*, 744 F.2d 1077, 1079 (5th Cir. 1984).[12]

2

The district court's opinion, organized first claim-by-claim and then defendant-by-defendant, establishes the basis upon which the court dealt with each of the claims raised by plaintiffs.[13] *See* Record Excerpts at tab 2 (Memoranda and Order at 9-30) ["Order"]. The appropriate way to challenge these findings would have been for plaintiffs to explicitly respond to them, point-by-point, with specific facts and evidentiary challenges pulled from the record. *See supra* note 12; *see generally supra* Part II.A-B.1. That, unfortunately, is not what the plaintiffs have chosen/been able to do. Rather, plaintiffs have stepped

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[11] For more cases discussing how summary judgment should be reviewed on appeal, see *Herrera v. Millsap*, 862 F.2d 1157, 1159-60 (5th Cir.1989); *Reid v. State Farm Mut. Ins. Co.*, 784 F.2d 577, 578 (5th Cir.1986).

[12] A grant of summary judgment is not precluded by a dispute as to immaterial fact. *See Houston North Hospital Properties v. Telco*, 688 F.2d 408, 410 (5th Cir.1982) (citations omitted).

[13] A summary of the court's findings and rulings is attached as an Appendix.

back from the district court's opinion and responded with general challenges to the court's very specific findings.[14] To fully resolve each of these contentions, we consider them individually.

(a)

*Did the district court err in finding that disclaimers in offering memoranda shielded defendants from accusations of misrepresentation?*

Plaintiffs have briefed a lengthy list of misrepresentations allegedly made by defendants. The gist of plaintiffs' overall argument is that: (i) they were induced to purchase interests in Onshore with promises of low risk and

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[14] Plaintiffs argue that the district court committed reversible error by:

> (a) failing to note twenty-eight (28) contested issues of material fact listed in Defendants' Joint Pretrial Order Filed *after* Defendants had made their summary judgment motions; (b) totally failing to discuss how the moving party Defendants had satisfied their burden of production or the legal standard for making that determination; (c) assuming that the moving party Defendants had satisfied their burden of production of the legal standard for making that determination; (d) and overlooking deposition testimony and other documents presented by the non-moving Plaintiffs, including Plaintiffs' Pretrial Order, which identified twenty-four (24) witnesses prepared to testify as to each issue based on their personal dealings with Defendants.

Appellants' Brief at vi, *Topalian v. Ehrman*, Nos. 90-2104, 90-2105, 90-2106 (5th Cir. filed Oct. 24, 1990) ["Appellants' Brief"].

high profits, and that, (ii) even though plaintiffs were given a rescission opportunity when the financing deadline established in the first memorandum expired, that opportunity was not an honest one and defendants are, therefore, liable for their misrepresentations.

As noted by the district court, despite their differences, both memoranda warned plaintiffs of the Onshore risk.[15] Moreover, the differences between these two memoranda are harmonized by Onshore's rescission offer – defendant's opportunity to, in essence, enforce the terms of the first memorandum by walking away from the Onshore deal. Although plaintiffs assault the legitimacy of that opportunity,[16] they have produced no tangible

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[15] Specifically, the district court noted that:

> [b]oth documents warn the investor of the "high degree of risk" and both state, ' . . . and, accordingly, there is no assurance that any distributions will . . . be made to the limited partners.' . . . Further, along with the second memorandum, each investor was sent an 'offer of [rescission].' . . . the Plaintiffs do not deny signing any of the documents. What they do deny is that they *read* any of the documents either before or after signing them.

Order at 11-12; *id.* at 14 ("The offering memorandum clearly states that the investors might never see a penny of their investment and might never make a profit. The promissory notes clearly state that the signer is responsible for the debt. It is well settled law that an adult is responsible for reading the documents he signs.").

[16] According to plaintiffs, [t]he unlawful rescission offer was made after December 31, 1984, it was not

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evidence to suggest anything less than "fair play" on the part of defendants. Such was the observation of the district court[17] and, having reviewed the summary judgment record thoroughly, we agree with and affirm the district court's findings.

(b)

*Did plaintiffs know, or should plaintiffs have known, about defendants' alleged misrepresentations by May 1, 1985?*

The controlling date for purposes of the running of the respective statutes of limitations is when a purchaser of securities knew – or in the exercise of reasonable

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> made to all subscribers, did not require an affirmative reconfirmation and was not accompanied by a disclosure including all information necessary to update previously provided disclosures. Furthermore, Defendants did not give any disclosure materials to Plaintiffs until well after the Partnership had secured financing.

Appellants' Brief at 26-27. And appellants add, "Defendants were able to resell the units to Plaintiffs while Plaintiffs were still under the influence of Defendants' continuing fraudulent misrepresentations and high-pressure selling tactics" *Id.* at 26.

[17] *See* Order at 27:

> Nothing appears to have been kept secret from the Plaintiffs. In fact, in their depositions, they admit their ignorance of any wrongdoing. They all state that they did not read any of the documents they received in connection with Onshore, including the ones they signed, or they scanned them, did not understand them but sought no explanation.

diligence, should have known – of the alleged wrongdoing. *See Corwin v. Marney, Orton Invs.*, 843 F.2d 194, 197 (5th Cir.), *cert. denied*, 488 U.S. 924, 109 S.Ct. 305, 102 L.Ed.2d 324 (1988), *citing Breen v. Centex Corp.*, 695 F.2d 907, 911 (5th Cir.1983). Plaintiffs challenge the district court's finding that they knew or should have known of defendants' alleged wrongdoing by May 1, 1985. They argue that "[d]efendants intentionally and fraudulently omitted and concealed all relevant facts from Plaintiffs."[18] Plaintiffs also argue that they have met their evidentiary burden for surviving defendants' motions for summary judgment.[19]

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[18] Appellants' Brief at 44. In fact, plaintiffs go so far as to contend that "[t]he question of whether a party had sufficient opportunity so that in the exercise of reasonable diligence he would have discovered the facts forming the basis of his cause, invariably raised questions of fact." Appellants' Brief at 43.

[19] Appellants' Brief at 42:

> The Court's finding is not only preposterous but in conflict with: (a) portions of its own Opinion which repeatedly states that Plaintiffs lacked knowledge of any wrongdoing by certain Defendants at the time of the alleged wrongs; (b) Defendants' Pretrial Order which states that the date when each Plaintiff should have known of the alleged wrongs as to each Defendant was a contested issue of fact; (c) Plaintiffs' Complaint and other documents which consistently state that Defendants fraudulently concealed their wrongdoing and prevented Plaintiffs from suspecting any wrongdoing until May, 1987; (d) the uncontested fact that selling activities were still continuing and all Plaintiffs were just receiving the "Other" Memorandum on May 1, 1985, the date used by the Court; and (e) the fact that Defendants continuously authorized secondary sales of restricted securities for an indefinite period.

General allegations of concealment inserted in plaintiffs' complaint or pretrial order are simply not enough to either toll a statute of limitations or survive a motion for summary judgment. We find that the district court rightfully demanded more. *See generally supra* Part II; *see also Irving Trust Co. v. United States*, 221 F.2d 303, 305 (2d Cir), *cert. denied*, 350 U.S. 828, 76 S.Ct. 59, 100 L.Ed. 740 (1955) (despite pretrial order specifying a number of issues being contested, judge may grant motion for summary judgment upon showing that there is no genuine issue to be tried).[20]

(c)

*Is there a genuine issue of material fact as to when the limitations period on plaintiffs' causes of action under sections 12(1) and 12(2) of the 1933 Securities Act began to run?*

Plaintiffs argue that there is a genuine issue of material fact as to when the limitations period on their causes of action under sections 12(1) and 12(2) of the Securities Act of 1933 began.[21] In short, plaintiffs argue that

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[20] The *Irving* court also noted the function of summary judgment – to make determinations without the expense and delay of trial where there are no real issues – and found that statements in pretrial order do not preclude entry of summary judgment. *Id.*

[21] Section 12(1) creates civil liability where mail and other instrumentalities of interstate commerce are used in the sale, delivery, or offer of sale of an unregistered security; section 12(2) imposes liability on any person who offers or sells a security "by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading. . . . " 15 U.S.C. § 77*l*(2) (1989).

defendants assured them that Onshore would be a sound and lucrative venture. Defendants contend, however, that the district court correctly concluded that investors were not diligent in bringing their claims under the Securities Act of 1933. More precisely, defendants stress that Plaintiffs did not furnish any evidence or cite any authorities to rebut the evidence and authorities offered by defendants regarding the one-year statute of limitations on plaintiffs' claims under § 12(2) of the Securities Act of 1933. *Codified at* 15 U.S.C. § 77*l*(2) (1989).

Each plaintiff signed a subscription agreement when they purchased Onshore interests -- a subscription agreement that should have put these investors on notice of the speculative nature of their investment. It certainly triggered a reason to exercise reasonable diligence.[22] If plaintiffs subsequently were told something contrary to this agreement that should have dyed the flag raised by the subscription agreement an even brighter shade of red.

Section 13 of the Securities Act of 1933 provides:

> No action shall be maintained to enforce any liability created under section 77k or 77*l*(2), of this title unless brought within one year after the discovery or the untrue statement of the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 77*l*(1), of this title, unless brought within one year after the violation upon which it is based. *In no event* shall any such action be brought to enforce a liability created

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[22] See *supra* Parts II.A-B.2.b.

> under . . . section 77*l*(1) more than three years after the sale.

*Codified at* 15 U.S.C. § 77m (1989) (emphasis added). Plaintiffs filed this lawsuit on December 3, 1987. All of the plaintiffs, with the exceptions of Steubling, LaCelle, Mikles and MJM, purchased their Onshore units before November 30, 1984 by executing the subscription agreements. Therefore, under the discovery rule of section 77m of Title 15,[23] the latest date that any of these plaintiffs could have filed suit in order to toll the one-year limitation period would have been December 1, 1985. Even if we were to disregard the discovery rule of section 77m, the latest date that these plaintiffs could have filed suit to toll the three-year limitation period would have been December 1, 1987. In short, plaintiffs' claims are barred by both of the limitation periods in section 77m of Title 15. Steubling, LaCelle, Mikles, and MJM purchased their Onshore units and executed the subscription agreement by May 1, 1985. Accordingly, their claims are barred by the one-year limitation prescribed by section 77m of Title 15.

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[23] This section reads:

> No action shall be maintained to enforce any liability created under section 77k or 77*l*(2) of this title unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 77*l*(1) of this title, unless brought within one year after the violation upon which it is based. In no event shall any such

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(d)

*Were plaintiffs' 10(b) and 10(b)(5) claims properly time-barred?*

Plaintiffs have tucked a related "catchall" contention within the pages of their brief – namely that they have suffered financial injuries as a result of various predicate acts, including violations of section 10(b) and federal mail and wire fraud statutes. Plaintiffs elaborated upon this contention in their Supplemental Brief. *See* Supplemental Brief on the Impact of the Supreme Court's Recent Decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow vs. Gilbertson* (filed Sept. 3, 1991) ["Supplemental Brief"].

In *Lampf*, the United States Supreme Court, in a majority opinion authored by Justice Blackmun, held that: (i) the statute of limitations applicable to actions under section 10(b) consists of the one-and-three-year provisions of the Securities Exchange Act and Securities Act for causes of action which they specifically provided for; and that (ii) equitable tolling is not applicable. *See Lampf v. Gilbertson*, ___ U.S. ___, 111 S.Ct. 2773, 2781-82, 115 L.Ed.2d 321 (1991). Plaintiffs, with *Lampf* in hand, argue that it is beyond dispute that all plaintiffs filed this

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action be brought to enforce a liability created under section 77k or 77*l*(1) of this title more than three years after the security was bona fide offered to the public, or under section 77*l*(2) of this title more than three years after the sale.

lawsuit within the three-year cut-off of Section 9(e). They then go on to argue the dissenting position of Justices Kennedy and O'Connor – "that a 3-year absolute time bar is inconsistent with the practical realities of § 10(b) litigation[,]" given the difficulties in discovering whether a violation of the securities laws occurred at all. *Lampf*, 111 S.Ct. at 2790.

In dealing with plaintiffs' section 12 claims, the district court applied the one- and three-year limitations periods prescribed for those actions.[24] The same reasoning and the same undisputed evidence establishes that plaintiffs' 10b-5 claims are barred by the one- and three-year statute recognized in *Lampf*. Moreover, without the benefit of *Lampf*, the district judge applied a two-year statute to plaintiffs' Rule 10b-5 claims.[25] If plaintiffs' claims were barred by a two-year statute of limitations, they are necessarily barred by the one-year statute of limitations recognized in *Lampf*. Accordingly, we affirm the district court's finding that plaintiffs' section 10(b) and Rule 10(b)(5) claims are time-barred.

(e)

*Were plaintiffs' RICO claims properly barred?*

The district court granted defendants' motions for summary judgment on plaintiffs' RICO claims, finding that:

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[24] *See supra* Parts II.A-B.2.c.

[25] *See* Order at 13.

[Plaintiffs] responded late and did not respond at all to the portion of the motion dealing with the RICO claims. The evidence already of record, presented by other Defendants, or by Ehrman with the motion, shows no evidence of illegality or factual dispute. The Court finds that Plaintiffs have failed to state a claim under RICO against the Ehrman Defendants.[26]

Our review of the record supports these findings, and plaintiffs have added nothing new in their presentation to this court.[27] We therefore find that plaintiffs' RICO claims were properly barred.

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[26] Order at 15. Specifically, the court stated that:

The summary judgment evidence shows that the efforts expended by the Defendants were all legitimate business practice. Ehrman and the other Defendants entered into agreements for the partnership to participate in drilling programs. Financing was arranged. Units were offered and sold to the Plaintiffs and other investors. Wells were drilled, some produced oil or gas and the Partnership was paid its share of money due. The Offering Memorandum and other documents state how the money would be paid out of funds received. This is normal business practice. There is no evidence of illegality.

[27] Plaintiffs' entire RICO argument is as follows:

However, throughout the text of their Complaint as well as in the RICO statement, Plaintiffs clearly detailed that they were fraudulently induced to make sizeable investments of money in an "Enterprise" which was conceived, developed and operated for the unjust enrichment of the Defendants. The "Enterprise" referred to is clearly the limited

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(f)

*Did the district court err by assuming defendants had no responsibility with respect to their authorization of secondary offers and the sale of restricted onshore units?*

According to plaintiffs, the record shows that defendants sold securities to people whom defendants knew could not afford them – people, some of whom were on the verge of bankruptcy, who indicated that they did not have the money to purchase the securities, along with other "unsuitable and unsophisticated" investors. Plaintiffs also assert that, in their Proposed Pretrial Order, they offered the district court a list of twenty-four witnesses capable of testifying as to these matters.[28]

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> partnership – ONSHORE. It was plain to see that they were not referring to the Defendants as the "Enterprise."
>
> Plaintiffs do contend, however, that all the Defendants conducted or participated, directly or indirectly, in the business affairs of the limited partnership – the Enterprise – through a pattern of racketeering activity in violation of 18 U.S.C. § 1962. *All of the Defendants were an integral part* of the scheme to deprive Plaintiffs of their investment in ONSHORE. They each participated in the scheme to unjustly enrich themselves to the loss and detriment of the Plaintiffs.

Appellants' Brief at 48 (emphasis added).

[28] More specifically, plaintiffs allege that:

> The Defendant General Partners and their seller-agents consciously ignored the Partnership's "Suitability Standards" by offering units to prospective

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This is all the plaintiffs have to offer – no specific allegations, not even so much as general allegations balanced upon the tip of a factual kernel, to connect the activity of any defendant(s) to what plaintiffs allege. *See generally supra* Part II; *see also* Fed.R.Civ.P. 56(e) (Nonmovant "may not rest upon the mere allegations or denials of the adverse party's pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial."); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49, 106 S.Ct. 2505, 2510-11, 91 L.Ed.2d 202 (1986) (movant has burden of showing that no genuine issue of fact exists, but non-moving party is not thereby relieved of producing evidence that would support jury verdict). Which of the defendants made such offerings, and to whom? Which investors indicated they did not have the money to purchase, and what exactly did they say? Plaintiffs' allegations are better suited for a complaint. After some eighteen months of discovery, tens of thousands of pages of deposition and transcripts, thousands of pages of documents and extensive interrogatories and admissions, there should be more. The burden to discover a

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> investors who did not qualify, some of whom indicated that they did not have the money to purchase a unit. However, the guarantees of no loss, the expectancy of a return of three or four times the initial investment, the "no cash down basis" and the assurances that limited partners could sell back their shares for double what they paid were irresistible lures to Plaintiffs and others.

Appellants' Brief at 24.

genuine issue of fact is not on this court.[29] Accordingly, we find that summary judgment was appropriate.

(g)

*Should summary judgment granting defendants' counterclaims be reversed?*

The Ehrman defendants moved for summary judgment on their counterclaims against several plaintiffs regarding unpaid promissory notes and cash calls used by these defendants to purchase Onshore interests. The evidence shows that the named plaintiffs signed the notes and have not paid them, and plaintiffs have made no showing to the contrary.[30] The district court's grant of summary judgment on this issue is supported by our recent holding in *Colony Creek, Ltd. v. Resolution Trust Corp.*:

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[29] *See Nissho-Iwai American Corporation v. Kline*, 845 F.2d 1300, 1307 (5th Cir.1988) (court not required to search entire record to ensure that record is "bereft of genuine issue of material fact.").

[30] The evidence we allude to includes deposition testimony, copies of signed notes, and *unanswered* interrogatories and requests for admissions from defendants to plaintiffs. In the words of the district court:

> Mr. Lopez is obviously not aware of the law in regard to responding to a motion for summary judgment. If factual issues abound, this was the time to present them, with supporting documentation, to this court. Mr. Lopez has failed to present more than unsubstantiated allegations. . . .

Order at 15.

> We have said before that because of the relative simplicity of the issues involved, suits to enforce promissory notes "are among the most suitable classes of cases for summary judgment." *Lloyd v. Lawrence*, 472 F.2d 313, 316 (5th Cir. 1973). This statement holds true today Appellee's motion and supporting materials established the elements necessary for recovery: the RTC holds a valid claim against Colony Creek and Goldberg, the note has matured according to its terms, and Colony Creek and Goldberg have defaulted.

941 F.2d 1323, 1325 (5th Cir.1991) (citations omitted).[31] Accordingly, we affirm the district court's grant of summary judgment on defendants' counterclaims.

*(h)*

*Plaintiffs' other summary judgment contentions*

We have sifted through plaintiffs' briefs and found numerous points tucked within their pages. Our efforts have separated out a few more contentions worthy of discussion.

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[31] *See also Hemphill v. Greater Houston Bank*, 537 S.W.2d 124, 125 (Tex.Civ.App. – Houston, [14th Dist.] 1976, no writ) (holding that summary judgment is appropriate if summary judgment proof establishes that moving parties are holders of the notes, the notes have matured according to their terms, and nonmoving parties have defaulted).

(1)

*The issues identified in defendants' pretrial Order*

Throughout their brief and during oral argument, plaintiffs have argued that the defendants' Pretrial Order, filed after their Motions for Summary Judgment, identified twenty-eight contested issues of material fact, and that plaintiffs' own Proposed Pre-trial Order lists at least twenty-four witnesses prepared to testify about defendants' fraudulent inducements and assorted Onshore wrongdoings. Plaintiffs argue that these issues are sufficient to defeat defendants' motions for summary judgment.

Defendants assert that this contention lacks merit for two reasons: (i) a pre-trial order is not competent summary judgment proof and (ii) plaintiffs' list of contested issues do not create "issues of material fact" as that term is used for the purposes of summary judgment. We agree. First, plaintiffs' "list of unfiled fact issues for the proposed pretrial order does not constitute summary judgment evidence, but is merely in the nature of pleadings, which cannot be used to create an issue of fact." *Geiserman v. MacDonald*, 893 F.2d 787, 793 (5th Cir.1990) (citation omitted); *accord Irving Trust Company v. United States*, 221 F.2d 303, 305 (2d Cir.), *cert. denied*, 350 U.S. 828, 76 S.Ct. 59, 100 L.Ed. 740 (1955). Rule 56(e) of the Federal Rules of Civil Procedure requires a nonmovant to go beyond pleadings to establish the presence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). Second, the Supreme Court has discussed "materiality" and where, as here, the summary judgment evidence

establishes that one of the elements of the plaintiffs' cause of action does not exist as a matter of law, or that plaintiffs' cause of action is barred by a statute of limitations, all other contested issues of fact are rendered immaterial. *See Celotex*, 477 U.S. at 323, 106 S.Ct. at 2552 ("[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.").[32]

(2)

*The deposition testimony of defendant Joel Middlebrook*

According to plaintiffs, the district court ignored important deposition testimony of defendant Joel Middlebrook,

> which candidly revealed that Defendants Houston Petroleum Company (H.P.C.) and John N. Ehrman (Ehrman) put on "dog-and-pony shows" to entice prospective investors to purchase limited partnership securities (units) and engaged in prohibited general solicitations of potential investors in violation of SEC Rule

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[32] Similarly, in *Anderson v. Liberty Lobby, Inc.*, the Supreme Court stated that "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986) (citation omitted).

> 502(c) of Regulation D, 17 C.F.R. § 230.502(c), promulgated under the 1933 Securities Act.[33]

We disagree. After eighteen months of discovery, the only "evidence" plaintiffs produced in response to defendants' motions for summary judgment was an unsigned letter and a one-page excerpt from Ms. Joel Middlebrook's deposition, the bookkeeper for the Houston Petroleum Company.[34] Ms. Middlebrook did not purchase any Onshore shares, nor is she a plaintiff in this lawsuit. While the deposition excerpt and letter do illustrate Ms. Middlebrook's dissatisfaction with HPC, neither of these provides reliable evidence that HPC or O'Donnell have, or may have, violated the Securities Act or RICO. Such insignificantly probative facts are insufficient to satisfy plaintiffs' summary judgment burden. *See Anderson*, 477 U.S. at 249-50, 106 S.Ct. at 2511.

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[33] Appellants' Brief at 2. The testimony in question has been reproduced in Record Excerpts at 466 (Filed Jan. 8, 1991):

> Q And what was the occasion that brought about your learning of Houston Petroleum Company?
>
> A Well, one time I went to their office, before they started the program, and visited with them. They had several people there that showed the office and what they were going to drill, and so on. It was a kind of a dog-and-pony show for potential investors that John had set up and did.

[34] The district court properly characterized that letter as "a rambling stream of consciousness letter from one Defendant to another which proves nothing." Order at 22.

C

Plaintiffs also assert that the district court erred in denying their Motion to File a Second Amended Complaint, which, according to plaintiffs, detailed the history and pattern of defendants' unlawful activities and alleged that a subsequent non-registered offering – Texas Energy Ltd. – by Ehrman and others was a continuation of defendants' investment scheme. District courts generally are afforded great discretion regarding trial procedure applications (including control of the docket and parties), and their decisions are reviewed only for abuse of discretion. *See Pierce v. Underwood*, 487 U.S. 552, 108 S.Ct. 2541 2546-47 & n. 1, 101 L.Ed.2d 490 (1988). Rule 15(a) of the Federal Rules of Civil Procedure provides that:

> A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by the written consent of the adverse party; *and leave shall be freely given when justice so requires.*

Fed.R.Civ.P. 15 (emphasis added). Applying Rule 15, this court has stated that whether to allow an amendment is a decision to be made by the district court. *See Ross v. Houston Indep. Sch. Dis.*, 699 F.2d 218, 228 (5th Cir.1983). Precisely,

> [o]nce a responsive pleading has been filed, a pleading may be amended only by leave of court or by consent of the adverse party. Fed.R.Civ.P. 15(a). While "leave shall be freely given when justice so requires," the decision rests in the sound discretion of the trial court . . . . Our review extends only to whether the trial court abused that discretion.

*Id.* at 228 (citations omitted).[35]

This case's convoluted procedural history suggests that it is litigation with *Bleak House* potential. One chapter within that history is the *opportunity plaintiffs were given* to amend their complaint on December 18, 1987. Another is the *opportunity plaintiffs were given,* following the court's granting of an extension of time, to join new parties until August 9, 1988. Rather than taking advantage of these opportunities, plaintiffs waited until they had expired and then moved for another extension of time to join new parties – a motion the district court denied. Now plaintiffs appeal the district court's denial of their September 9, 1988 Motion for Leave to File a Second Amended Complaint or in the Alternative Motion for Joinder of Persons Needed for Just Adjudication. We will not oblige and, accordingly, we affirm the district court's denial of that motion.

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[35] The district court should examine several factors to determine whether to allow an amendment under Rule 15. *See Earlie v. Jacobs,* 745 F.2d 342, 345 (5th Cir.1984). The court should consider whether allowing the amendment would cause undue prejudice to the nonmovants, undue delay in the proceedings and whether the movants are acting in bad faith. *Id.* (citations omitted).

D

Plaintiffs also allege that the district court dismissed IDL as a party solely as a Rule 11 sanction to punish them for filing an allegedly frivolous claim. More specifically, plaintiffs assert that the district court's dismissal of IDL is (i) a mistake of law and (ii) in contempt of this court's mandate to reinstate IDL as a defendant.

1

Plaintiffs contend that this court, in deciding plaintiffs' previous appeal, implicitly recognized that the case now before us is not frivolous.[36] They are wrong. The appeal plaintiffs previously brought before us was from the district court's order dismissing IDL for lack of personal jurisdiction. The panel opinion did not consider, examine, or rule on the merits of the overall case. Accordingly, we do not find that our previous opinion is persuasive authority in opposition to defendants' motions for summary judgment.

2

Plaintiffs also assert that the district court's dismissal of IDL as a party is in contempt of this court's mandate to reinstate IDL as a defendant. We disagree. The only debatable issue is whether IDL should be reinstated as a defendant to plaintiff Topalian's claims – an issue incidental to our consideration of the merits of plaintiffs'

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[36] See *Topalian v. Ehrman*, 899 F.2d 12 (5th Cir.1990) (unpublished).

overall action.[37] Finding that plaintiffs have not even proximately approached meeting their summary judgment burden,[38] we find that the district court properly granted summary judgment against them.

E

Another issue raised by plaintiffs is whether, should this court decide to reverse the district court's summary judgment against plaintiffs, there is sufficient evidence in the record to justify reassignment of this case to another

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[37] On March 13, 1990, this court dismissed the IDL appeal as to all plaintiffs except plaintiff Topalian – the only party properly specified in the notice of appeal. The case was remanded to the district court for reconsideration of Topalian's claims against IDL. *See Topalian v. Ehrman*, 899 F.2d 12 (5th Cir.1990) (unpublished). On August 6, 1990, the district court entered an order dismissing Topalian's claims against IDL as a sanction and imposed monetary sanctions against plaintiffs' counsel, Armando Lopez, and against three of the plaintiffs. On November 30, 1990, plaintiffs' counsel filed a notice of appeal (on his own behalf, on Topalian's behalf, on the three sanctioned plaintiffs' behalf, and on behalf of another plaintiff, Garcia-Quiroga). This notice stated that the appeal was taken from the August 10, 1990 order and an order which had been entered on November 7, 1990, denying a motion for reconsideration and an oral request for entry of a Rule 58 judgment. On April 3, 1991, that appeal docketed as No. 90-2806, was dismissed for lack of a Rule 58 judgment. On June 27, 1991, the district court entered a Rule 58 judgment and, on July 18, 1991, plaintiffs' counsel filed another notice of appeal. That appeal was docketed as No. 91-2818 and is presently pending before the court.

[38] *See supra* Parts II.A-B.1.

district court judge. We find no grounds for reversal and, therefore, we do not reach this issue.

F

The final matter before us is whether we should grant defendant Rockwood's request for sanctions pursuant to Rule 38 of the Federal Rules of Appellate Procedure. Under Rule 38, this court may impose sanctions upon parties who pursue frivolous appeals. *See Coghlan v. Starkey*, 852 F.2d 806, 810-11 (5th Cir.1988). A frivolous appeal is one "that relies on legal points that are not arguable on the merits." *Lyons v. Sheetz*, 834 F.2d 493, 496 (5th Cir.1987) (citation omitted); *see also McAfee v. Fifth Circuit Judges*, 884 F.2d 221, 223 (5th Cir.1989), *cert. denied*, 493 U.S. 1083, 110 S.Ct. 1141, 107 L.Ed.2d 1046 (1990). We find that, although plaintiffs have not met the evidentiary burden required to sustain defendants' motions for summary judgment, we cannot summarily dismiss the issues they have brought before us as "frivolous." Accordingly, we deny defendant Rockwood's request for sanctions.

III

For the foregoing reasons, we AFFIRM.

APPENDIX

I. Claims Against All Defendants:

| | |
|---|---|
| A. Section 17(a) Claims: | Evidence presented shows that plaintiffs signed documents |

| | |
|---|---|
| | necessary to subscribe to units, and that documents warn investors of "high degree" of risk; each investor was sent "offer of rescission"; plaintiffs' claims under section 12(2) of the 1933 Act are time-barred; the section 12(1) claims are clearly time-barred by the one-year statute of limitations. |
| B. 10b-5 Claims: | Since the tolling period for plaintiffs' claims commenced by May 1, 1985 at the latest, and the appropriate limitations period for section 10b-5 claims in Texas was two years, plaintiffs' claims are time barred. |
| C. "§ 55t" Claims: | District court found that no such statute exists. |
| D. RICO Claims: | Since Robert B. Eckis, Jr., was not listed as a defendant in response to Question 2 of the district |

court's RICO standing order, the RICO claims against him were dismissed.

II. Defendants' Motions:

A. John Ehrman and EIG: "The summary judgment evidence shows that the efforts expended by the Defendants were all legitimate business practice. . . . [T]he evidence already of record, presented by other Defendants, or by Ehrman with the motion, shows no evidence of illegality or factual dispute." Order at 15.

B. Roderick Johnson: "Plaintiffs have admitted that they know of no wrongdoing by Johnson, Johnson did not sell them securities. In fact, Johnson had nothing to do with their decision to purchase these securities. The Court has made an exhaustive review of all the evidence. This has

revealed that Plaintiffs did not read either offering memorandum in any depth and had no knowledge of Johnson's role in the partnership." Order at 17.

C. Rio Bravo & Bert Gamble: "The evidence shows that Rio Bravo and Mr. Gamble had no contact with Onshore other than the two agreements. . . . The Court has reviewed the documents presented by Rio Bravo. There is no evidence of wrongdoing." Order at 19-21.

D. HPC & Richard O'Donnell: "Defendants' evidence shows that none of the Plaintiffs believed HPC did anything with Onshore investors, let alone anything wrong. Plaintiffs' response again is only full of contentions that at trial they will prove their claims." Order at 22.

| | | |
|---|---|---|
| E. | Rockwood: | (1) "Nowhere in the Complaint or the RICO response is it alleged that Rockwood made any affirmative misrepresentations or engaged in any predicate RICO acts. . . . Based upon the evidence presented, Rockwood contends that there is no evidence to show that Rockwood engaged in any RICO acts, made any misrepresentations to Plaintiffs[,] or was involved in any way with the sale of the units of Onshore." Order at 23.<br><br>(2) "The promissory notes signed by the Plaintiffs were assigned to Rockwood. . . . Rockwood is entitled to judgment as a matter of law on this contractual claim regardless of any ruling on Rockwood's motion for summary judgment on the claims |

against it, because the claims against Rockwood do not arise out of the Indemnification Agreement. . . . Therefore, Rockwood is entitled to judgment as a matter of law on the separate and independent ground of recovery based on the promissory notes." Order at 24-25.

F. Robert E. Eckis, Jr.: "In short, the Plaintiffs have asserted no knowledge of Mr. Eckis' involvement in any aspect of Onshore, and Mr. Lopez's response presents no factual dispute which could preclude summary judgment for this defendant." Order at 29.

G. Joel A. Middlebrook: "Mr. Lopez has not responded to this motion although it has been on file for almost two months. Since the motion is unopposed, and the

Court has not found any facts to show Middlebrook's liability, Middlebrook's motion shall be granted on the merits as to all claims." Order at 29.

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## APPENDIX B

**United States Court of Appeals**

FIFTH CIRCUIT
OFFICE OF THE CLERK

April 28, 1992

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Nos. 90-2104, 90-2105, & 90-2016 – Topalian, et al. v. Ehrman, et al.

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The Court has directed that the opinion entered in the above referenced causes on March 6, 1992 be corrected as indicated on the attached sheet.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By: /s/ Dawn Eiserloh
Deputy Clerk

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* * *

In dealing with plaintiffs' section 12 claims, the district court applied the one- and three-year limitations periods prescribed for those actions.[] The same reasoning and the same undisputed evidence establishes that plaintiffs' 10b-5 claims are barred by the one- and three-year statute recognized in *Lampf*. Moreover, without the benefit of *Lampf*, the district judge applied a two-year statute to plaintiffs' Rule 10b-5 claims.[] If plaintiffs' claims were barred by a two-year statute of limitations, they are necessarily barred by the one-year statute of

limitations recognized in *Lampf*. Accordingly, we affirm the district court's finding that plaintiffs' section 10(b) and Rule 10(b)(5) claims are time-barred.*

*On the eve of releasing this opinion, we learned that the Securities Exchange Act of 1934 § 27A, 15 U.S.C. § 78(aa), S. 543, P.L. 102-242, December 19, 1991 (emphasis added), was amended to provide as follows:

> (a) EFFECT ON PENDING CAUSES OF ACTION – The limitation period for any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.
>
> (b) EFFECT ON DISMISSED CAUSES OF ACTION – Any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991 –
>
> (1) which was dismissed as time barred *subsequent to June 19, 1991*, and
>
> (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.
>
> shall be reinstated on motion by the plaintiff not later than 60 days after the date of enactment of this section.

In the present case, the claims brought under the 1934 Securities and Exchange Act were dismissed by the district court in 1990 – that is, prior to *Lampf*, ___ U.S. at ___,

111 S. Ct. at 2773, and prior to this amendment's June 19, 1991 trigger date. Accordingly, we find that the amendment does not resurrect the plaintiff's claims.

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## APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| MICHAEL K. TOPALIAN, et al., Plaintiffs | § | |
| VS. | § | CIVIL ACTION NO. H-87-3826 |
| JOHN N. EHRMAN, et al., Defendants. | § | (Filed Oct. 6, 1989) |

MEMORANDUM AND ORDER:

Pending are various Defendants' motions to dismiss or for summary judgment, and Plaintiffs' motion for summary judgment. The Defendants' motions to dismiss need not be addressed because the Court shall grant the summary judgment motions on their merits.

Defendants John N. Ehrman and Ehrman Investment Group, Inc. ("Ehrman"); Rockwood Insurance Company ("Rockwood"); Rio Bravo Oil Company and Bert Gamble ("Rio Bravo"); Houston Petroleum Company and Richard O'Donnell ("HPC"); and Roderick Johnson, filed their motions by June 15, 1989, as ordered by the Court. Plaintiffs did not file a timely response to any of these motions. At the July 28, 1989 hearing, the Court heard argument concerning the responses filed on July 27 and 28, 1989. The Court indicated that it would look at the responses, bearing in mind they were filed late. The Court then held that any other Defendant could file a motion for summary judgment by August 4, 1989, and Plaintiffs could respond by August 11, 1989. In response,

Defendants, Joel A. Middlebrook and Robert E. Eckis, Jr. filed motions to dismiss and/or for summary judgment. Plaintiffs filed a response to Mr. Eckis's motion late, on August 14, 1989. In addition, without leave of court, on August 5, 1989 Plaintiffs filed their motion for summary judgment against Ehrman and Johnson, only, and Ehrman and Johnson have responded. At the August 28, 1989 docket call, Russek and his company were granted leave to file their motion for summary judgment. Plaintiffs were advised that their motion for summary judgment would be taken under advisement until the Defendants' motions were ruled upon. There are also outstanding motions for sanctions.

The Court has reviewed the extensive pleadings, depositions, and other evidence on file. All the issues have been fully briefed. There appear to be no material fact issues in dispute, and summary judgment should be granted to these Defendants.

Statement of the Case

Plaintiffs are fifteen of seventy-seven investors in the limited partnership. This action was brought by these fifteen Plaintiffs against twenty-three Defendants on December 3, 1987 seeking damages under Sections 12(1) and 12(2) and 17 of the Securities Act of 1933, as amended [15 U.S.C. §§ 77 1(1) and (2), 77o, and 77q(a)]; § 10(b) of the Securities Exchange Act of 1934, as amended [(15 U.S.C. § 78(g)] and Rule 10b-5 thereunder (17 C.F.R. § 240.10b-5); the Racketeer Influenced and Corrupt Organization Act, the "RICO Act" [18 U.S.C. § 1964(c)]; the Texas Securities Act (Tex. Rev. Civ. Stat. Ann., art. 581-33,

Vern. Supp. 1987); and for common law fraud and deceit, breach of fiduciary duty and "other conduct alleged to be in violation of the laws of the State of Texas." Not all Defendants are alleged to have violated each of these statutes.

The Plaintiffs allege that their damages arose from the offer and sale to them of limited partnership interests ("Units") in Onshore Exploration Ltd., 1984 Mid-Year Drilling Program, a Texas oil and gas limited partnership ("Onshore") during 1984 and 1985, (with the exception of plaintiff Charles F. LaCelle who purchased his Unit from another investor in January, 1986). The Plaintiffs allege a conspiracy participated in by all of the Defendants beginning with various acts alleged to have been committed prior to the sale of the Units as well as other developments which occurred long after the sales of the Units were completed.

Included among the original Defendants are Wayne M. Byles who was the general partner of Onshore until December, 1984, and his firm M.B.A. Investment, Inc.; W. Roderick Johnson, a lawyer, and his professional corporation, W. Roderick Johnson, P.C. ("Johnson"); and Ehrman Investment Group, Inc. ("EIG"), a Texas corporation, and its president, John N. Ehrman ("Ehrman"). Johnson and EIG became general partners of Onshore after Byles resigned. Also named as Defendants are Joel A. Middlebrook ("Middlebrook"), an accountant; Victor B. Russek ("Russek"), a geologist, and his company, Russek Co.; Rockwood Insurance Co. ("Rockwood"), a firm that issued investor bonds insuring the payment of the promissory notes executed by investors; Robert B. Eckis, Jr. ("Eckis"), individually, and in his representative capacity

as attorney-in-fact for Rockwood; Interdiscount Ltd. and its officers and agents, Tara Cole and Gideon Chern ("Interdiscount"); and four oil operators: Houston Petroleum Company ("HPC"), and its president, Richard O'Donnell; Rio Bravo Oil Company ("Rio Bravo"), and its president, Bert Gamble; Kelly Onshore Drilling Co., Inc. ("Kelly Onshore"), and its president, Lawrence Kelly; and Panterra Petroleum Co. ("Panterra") and H. Louis Lee and Roger E. Casey, who are named as "agent representatives" of Panterra. Louis Carlisle, Lawrence Kelly, Jr., Kelly Onshore Drilling Co., Inc., H. Louis Lee, Roger E. Casey, Panterra Petroleum Company, Gideon Chern and Tara K. Cole have not been served with process and have not entered their appearance in this case. The parties who have not been served are DISMISSED. Fed. R. Civ. P. 4(j). Interdiscount was dismissed for lack of jurisdiction. Wayne M. Byles and his firm M.B.A. Investment, Inc. were dismissed with prejudice August 23, 1989.

Three of the Plaintiffs, Bobby W. McDonald, Richard H. Manuel and Roy Jacobs, Jr., were officers and directors of Defendant EIG during the time some of the violations are alleged to have occurred. McDonald, a certified public accountant, functioned as EIG's controller during 1985, and Manuel was employed by EIG as a salesman in 1984 and again from October, 1985 to approximately the end of 1986. Manuel and McDonald near the end of 1986 got into a dispute with Ehrman and EIG over back salaries and fees and subsequently filed and sent complaints and grievances against Ehrman and EIG with the Texas Department of Labor and Standards, the I.R.S., the Texas Employment Commission, the Worthless Check Division

of the Harris County District Attorney's Office, Congressman Joe Barton, the State Bar of Texas, and possibly the Securities and Exchange Commission and the F.B.I.

The Plaintiffs claim that they were induced to buy the Units by means of manipulative and fraudulent activities, including misrepresentations of material facts and by the omission of certain material facts necessary to make the statements that were made not misleading. They claim that these misrepresentations and omissions were made not only in oral statements, principally concerning the drilling prospects and the value of the Units, but also in the two private placement memoranda (the "Memoranda") and in correspondence and other written documents.

A certificate of limited partnership for Onshore was filed with the Secretary of the State of Texas on September 25, 1984. Onshore was formed for the purpose of raising funds for and engaging in an oil and gas drilling program. Byles, who was the sole general partner of Onshore at the time of its formation, resigned in December, 1984, and was replaced as general partner by Johnson and EIG.

Onshore entered into oil and gas drilling agreements with Defendants HPC, Rio Bravo and Kelly Onshore. Pursuant to these agreements, a total of seventeen wells were drilled of which ten wells were commercial producers. Several payments of dividends were made to investors before the wells and their production were assigned to Rockwood to pay for the amount due on the investor notes.

Onshore began its solicitation of investments in November, 1984 and employed a private placement memorandum (the "Memorandum") dated September 30, 1984 which represented Byles was its general partner. Onshore thereafter updated the Memorandum dated November 30, 1984 to reflect that Johnson and EIG were its general partners. Offers and sales of the Units by Onshore were made in October, November and December, 1984 and in January, 1985. The November 30, 1984 Memorandum stated that the offering termination date was December 31, 1984. In January, 1985 Onshore forwarded a document to each investor who had subscribed on or before December 31, 1984 which permitted each subscriber to rescind his respective purchase of a Unit(s) or to re-affirm the purchase. Any investor who subscribed to a Unit prior to December 31, 1984 and who did not elect to affirm his earlier subscription had his subscription cancelled.

A purchase of a Unit by one of the Plaintiffs, Charles F. LaCelle ("LaCelle") occurred on January 26, 1986. LaCelle purchased this Unit not from Onshore, but from another investor, Mary Barrow.

The offering of Units was made primarily to accredited investors pursuant to Rule 506 of Regulation D (17 C.F.R. Sec. 230.506) promulgated by the Securities and Exchange Commission. Offerings made pursuant to Regulation D are exempt from the registration requirements of Section 5 of the Securities Act of 1933, as amended (15 U.S.C. § 77e). Offerings made pursuant to Rule 506 are also exempt from the registration requirements of the Texas Securities Act (Tex. Rev. Civ. Stat. Ann., Art. 581). Regulation D permits the offering to be made to not more

than 35 non-accredited investors and does not limit the number of offers and sales to accredited investors.

An investor could subscribe to a Unit by either paying cash or by executing a promissory note for the full amount of his subscription. Sales of the Units were made to a total of 77 investors, including fourteen of the fifteen Plaintiffs. Six of the Plaintiffs have defaulted in the payment of the promissory notes which they executed in connection with their respective subscription to Units.

EIG, which guaranteed the payment of the loan made to Onshore by Interdiscount, has been sued by Rockwood as a result of the default by several investors, including six Plaintiffs, in paying the amount due on the promissory notes executed at the time of their respective subscription to the Units. EIG and Onshore have filed a counterclaim in this action seeking payment of the amount due on said notes from the said six Plaintiffs.

Defendant Rockwood Insurance Company has filed a counterclaim against seven of the Plaintiffs seeking a money judgment based on promissory notes and indemnification agreements signed by those seven Plaintiffs in connection with their investment in Onshore.

EIG and Onshore have also filed a counterclaim against Plaintiff Warren Fienga ("Fienga") who defaulted in the payment of a cash call when he stopped payment of his check to Onshore dated April 7, 1986 in the amount of $8,000.00.

The Defendants deny the allegations and allege that even if the facts alleged were true, the Plaintiffs' causes of action are barred by the one and three-year statutes of

limitation applicable to claims under the Securities Act of 1933 and the two-year statute of limitation applicable to claims under the Securities Exchange Act of 1934, and that Plaintiffs have failed to state a claim under the RICO Act. Some of the Defendants deny participating in the offer and sale of the Units and deny that they had any fiduciary or other duties toward any of the Plaintiffs. Johnson denies any personal contact or communication with any of the Plaintiffs regarding the sale of any of the Units.

Rio Bravo's only connection with Onshore is a contractual relationship. On or about December 17, 1984, Onshore and Rio Bravo entered into two letter agreements and operating agreements covering drilling on the Southeast Cuero and Sheriff Prospects. Rio Bravo Oil Company drilled these wells in accordance with the terms of the respective agreements. Onshore has paid some but not all of the amount owed under the agreements.

Houston Petroleum Company's only connection with Onshore is a contractual relationship. Onshore and HPC entered into agreements permitting Onshore to invest in wells to be drilled by HPC. HPC drilled several wells in which Onshore invested. Many of these were or are producing oil wells.

The only involvement of Rockwood Insurance Company with Onshore was the issuance of investor bonds for the limited partners of Onshore. The bonds were a form of insurance in the event of nonpayment of the promissory notes executed by the Onshore investors.

After most of the Onshore investors failed to make payments on their promissory notes, Rockwood paid $2,716,459.19 to CrossLand Federal Savings Bank, who held the promissory notes. Rockwood had no involvement in the sale of limited partnership interests in Onshore and had no contact with any of the limited partners.

Defendant Middlebrook worked with EIG and Ehrman. There are no meaningful allegations made as to her involvement.

Summary Judgment

Summary judgment is authorized if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56, Fed. R. Civ. P. The United States Supreme Court has interpreted this rule to mandate the entry of summary judgment after an adequate time for discovery against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

Claims Against All Defendants

A. Individual Plaintiffs

Charles F. LaCelle purchased his unit from another investor. He never saw or took the time to read the Onshore private placement memorandum.

Dr. Richard Mikles subscribed to his Onshore Units on January 10, 1985. On September 25, 1985, he assigned

his Units to Larry Stephenson (not a party); the General Partners, EIG and Johnson, consented to the assignment. Dr. Mikles and the general partners also executed a mutual and general release of one another from all liability in relation to Dr. Mikles ownership of Onshore Units.

Mr. Jack E. Burroughs filed for bankruptcy in 1985 and was discharged on October 16, 1985. Any interest in or rights accruing to Mr. Burroughs as a result of his involvement with Onshore were transferred to the trustee or referee in the bankruptcy proceeding. Plaintiff's responses, filed late, do not mention these Defendants; accordingly the Court holds that the motions for summary judgment, so far as these Defendants are concerned, are unopposed. These Defendants have no standing to claim that any of the Defendants herein made any misrepresentations to them and their claims against all the Defendants are DISMISSED. For convenience, LaCelle will not be considered as one of "the Plaintiffs" below.

B. Section 17(a) Claims

Plaintiffs' claims under Section 17(a) of the 1933 Act have already been dismissed. C. Sections 12(1) and 12(2) Claims.

A principal contention of the Plaintiff is that they were assured at the time of their purchase that distributions from oil and gas well production would be sufficient to pay off the promissory notes executed in connection with the purchase of the Onshore Units.

The evidence presented clearly shows that the Plaintiff signed the documents necessary to subscribe to their units, and acknowledged receipt of both offering memoranda on or before May 1, 1985. Before May 1, 1985 they all signed the second memorandum affirmatively electing to retain ownership of their Onshore Unit(s). The subscription agreement, signed by the Plaintiffs states, in pertinent part,

> 3.(a) [The Investor warrants that he] (i) has adequate means of providing for his current needs . . . and he has no need for liquidity of his investment . . . (ii) with respect to each One (1) Unit subscribed, (1) has a net worth of at least $200,000 . . . and can bear the economic risk of losing his entire investment herein, and (iii) has . . . such knowledge and experience in financial matters that he is is [sic] capable of evaluating the relative risks and merits of this investment.
>
> 3.(d) He has received and read or reviewed . . . and is familiar with, the Partnership Agreement, the Memorandum, and this Agreement. . . .
>
> 3.(1) That the Partnership has no significant financial or operating history; this is the Partnership's first venture and the Units are speculative investments which involve a high degree of risk of loss by him of his entire investment in the Partnership.

According to the Plaintiffs' complaint, one of the significant differences between the two memoranda complaint, is the change in the general partner from Byles to Johnson

and EIG. There are also significant similarities. Both documents warn the investor of the "high degree of risk" and both state,

> DISTRIBUTION TO LIMITED PARTNERS
>
> No distributions will be made to Limited Partners until the Partnership has funds that the General Partner determines are not needed for the operations of the Partnership, and, accordingly, there is no assurance that any distributions will will [sic] be made to the limited partners.

No Plaintiff objected to the General Partner exchange. Further, along with the second memorandum, each investor was sent an "offer of recision." The investor was required to affirmatively elect to maintain ownership of his unit(s). Each Plaintiff elected not [sic] return his unit to Onshore. This evidence is not refuted by the Plaintiffs. The Plaintiffs do not deny signing any of the documents. What they do deny is that they *read* any of the documents either before or after signing them.

> No action shall be maintained to enforce any liability created under . . . section 12(2) [15 U.S.C. § 771(2)] unless brought within one year after the discovery of the untrue statement or the omission, or after the discovery should have been made by the exercise of due diligence, or if the action is to enforce a liability created under section 12(1) [15 U.S.C. § 771(1)], unless brought within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under . . . section 12(2) [15 U.S.C. § 771(2)] more than three years after the sale.

15 U.S.C. § 77m. The Plaintiffs purchased their interests on or before May 1, 1985, but did not bring suit to challenge the allegedly unlawful and misleading sale of unregistered securities until December 3, 1987. Therefore the Plaintiffs' claims under 12(2) of the 1933 Act are time barred. *Corwin v. Marney, Orton Investments,* 788 F.2d 1063, 1066 (5th Cir. 1986).

All the Plaintiffs except Steubling, LaCelle, Mikles and MJM purchased their units on or before November 30, 1984. Their Section 12(2) claims are barred by the three-year statute of limitations. 15 U.S.C. § 77m. The Section 12(1) claims are clearly time barred by the one-year statute of limitations. 15 U.S.C. § 77m.

D. 10b-5 Claims.

Plaintiffs have alleged violations of Section 10(b) and Rule 10b-5 (the 10b-5 claims) of the Securities and Exchange Act of 1934. "This circuit [eight] years ago determined that the appropriate limitations period for 10b-5 claims in Texas was two years." Corwin, *id.* at 1067, *citing Wood v. Combustion Engineering, Inc.,* 643 F.2d 339, 341-46 (5th Cir. 1981). The tolling period for Plaintiffs' claims commenced by May 1, 1985 at the latest. Therefore, their 10b-5 claims are time barred.

E. "§ 55t" Claims

Plaintiffs allege a claim under 15 U.S.C. § 55t. There is no such statute.

F. Plaintiffs' Response

Plaintiffs' counsel, Mr. Lopez, has filed his responses late, if at all, to the various motions for summary judgment. He has supplied the Court with many pages to read, but no facts to throw into material dispute.

Mr. Lopez has a skewed version of the law. He states, "In essence, the Ehrman Defendants assert that Plaintiffs should not be allowed to seek redress for the damages they suffered for relying on the fraudulent and deceitful misrepresentations of [Ehrman] because they should have read the Offering Memorandum." This statement is patently ridiculous. The Plaintiffs allege Ehrman induced them to purchase units and sign promissory notes by telling them the limited partnership distribution would be more than enough to pay the note and give the plaintiffs a substantial profit. In other words, the Plaintiffs are alleging that they were told that if they signed these documents, they would never have to pay any money, and they would make a lot of money. The offering memorandum clearly states that the investors might never see a penny of their investment and might never make a profit. The promissory notes clearly state that the signer is responsible for the debt. It is well settled law that an adult is responsible for reading the documents he signs.

Mr. Lopez has presented no argument or support to refute the limitations problems. Nor has he supplied the Court with any argument or facts to preclude the Court from granting summary judgment on these claims. Therefore, all Plaintiffs' claims as above set out are DISMISSED as to all Defendants.

G. RICO Claims

The Plaintiffs have also alleged claims under RICO. 18 U.S.C. 1962 et seq. Question Number 2 of the Court's RICO Standing Order requires Plaintiffs to name all the Defendants they allege are liable for RICO violations. Robert B. Eckis, Jr. is not listed as such a Defendant. Therefore, any RICO claims Plaintiffs have attempted to allege against Eckis are DISMISSED. The other Defendants have been named and their motions for summary judgment shall be discussed below.

The Defendants' Motions

A. John N. Ehrman and Ehrman Investment Group (Ehrman)

Ehrman's motion for summary judgment on the RICO claims contends that Plaintiffs have failed to state a claim under RICO.

The summary judgment evidence shows that the efforts expended by the Defendants were all legitimate business practice. Ehrman and the other Defendants entered into agreements for the partnership to participate in drilling programs. Financing was arranged. Units were offered and sold to the Plaintiffs and other investors. Wells were drilled, some produced oil or gas and the Partnership was paid its share of money due. The Offering Memorandum and other documents state how the money would be paid out of funds received. This is normal business practice. There is no evidence of illegality.

In response, Plaintiffs are obliged to present evidence to show that there are facts in dispute. *Celotex, supra.* Mr. Lopez responded late and did not respond at all to the portion of the motion dealing with the RICO claims. The evidence already of record, presented by other Defendants, or by Ehrman with the motion, shows no evidence of illegality or factual dispute. The Court finds that Plaintiffs have failed to state a claim under RICO against the Ehrman Defendants.

The Ehrman Defendants also requested summary judgment on their claims against several Plaintiffs on their unpaid promissory notes and cash calls. The evidence shows that the named Plaintiffs signed the notes and have not paid. Included in the evidence is deposition testimony, copies of signed notes, and unanswered interrogatories or requests for admissions from Defendants to the Plaintiffs. Clearly, Mr. Lopez was dilatory in not responding to the discovery requests.

In response, Mr. Lopez states, inter alia,

> The Ehrman Defendants' contention that there is no genuine issue of any material fact with regard to the issue of Plaintiffs' liability for the Notes and with regard to the issue of who, if anyone, is the holder in due course of these Notes, is an outrageous and untruthful statement. . . .
>
> Defendants are spearheading [this litigation and] have apparently decided that the only way to escape liability is by burdening Plaintiff's counsel with an abundance of non-meritorious motions. . . .

> Factual issues abound with respect to every issue in this case. etc. etc.

Mr. Lopez is obviously not aware of the law in regard to responding to a motion for summary judgment. If "factual issues abound," this was the time to present them, with supporting documentation, to this Court. *Celotex, supra*. Mr. Lopez has failed to present more than unsubstantiated allegations and whining. He does not cite one case or present one piece of evidence in support of his position. Therefore, the Court shall grant summary judgment to these Defendants on their claims against the named Plaintiffs.

B. Roderick Johnson and W. Roderick Johnson, P.C. (Johnson)

Johnson contends that he is entitled to summary judgment because after two years of discovery, there is no evidence to show that he engaged in whatever wrongdoing the Plaintiffs have attempted to allege in their first amended complaint and response to the RICO Order. Among Johnson's complaints about the failure of Plaintiffs' allegations are 1) the complaint does not comply with Rule 8 because it rambles and is impossible to read coherently; 2) the averments of fraud have not been stated with particularity, in violation of Rule 9(h); and 3) in their response to the RICO order, Plaintiffs failed to allege specific facts in support of their claims. Johnson contends that since Plaintiffs failed to respond to requests for admissions within the required 30 days, the requests are deemed admitted. Therefore, Plaintiffs have admitted that they know of no wrongdoing by Johnson, Johnson

did not sell them securities. In fact, Johnson had nothing to do with their decision to purchase these securities.

The Court has made an exhaustive review of all the evidence. This has revealed that Plaintiffs did not read either offering memorandum in any depth and had no knowledge of Johnson's role in the partnership.

Mr. Lopez filed his response to this motion late. The Court was initially grateful to observe that it was so short. The delight was short lived, however. Mr. Lopez again failed to respond adequately. Mr. Lopez first contends that Johnson gave the Plaintiffs an extension of time in which to respond to the requests for admission. He does not state the length of the extension, and there is no proof of this agreement. Further, Johnson, in his reply to the response, denies any agreement. Next, Mr. Lopez complains that although the same requests were made of each Plaintiff, the requests were "scrambled so that Plaintiffs' counsel would have to respond to each request individually." Mr. Lopez states that the purpose of this tactic was to unduly burden him with paperwork.

Mr. Lopez filed this lawsuit. He can not now be heard to complain that the Defendants choose to defend themselves. Requests for admission are a normal part of discovery. The requests were for admissions of fact known only to each individual Plaintiff, not to counsel. The Court is at a loss as to why Mr. Lopez would even attempt to respond to these requests. Further, a review of the responses, filed late, shows that the Plaintiffs did not even begin to reply until well after the 30-day limit for response had passed. Mr. Lopez's complaints have no merit.

Mr. Lopez next contends that Johnson was the attorney for the investors and thus had some sort of fiduciary duty. Mr. Lopez has produced no supporting evidence. If this is an essential element of Plaintiffs' case, they are obliged to submit proof in response to a motion for summary judgment. *Celotex, supra.*

Mr. Lopez contends there is "no question that the Johnson Defendants participated in the fraudulent sale of securities." Mr. Lopez has presented no evidence of a fraudulent sale of securities or that Johnson participated. This contention fails.

Then Mr. Lopez rambles on for three pages about the Ehrman Defendants' alleged wrongful conduct which should be imputed to Johnson. In support of this response, Mr. Lopez submits one of Ehrman's affidavits which proves, inter alia, that Johnson was one of the General Partners for Onshore. This fact is undisputed. It is not evidence of fraud or wrongdoing. The second Offering Memorandum clearly states that Johnson is a General Partner. The Plaintiffs have admitted that they either did not read or did not attempt to understand the memorandum, and they did not know or care that Johnson was a General Partner of Onshore. Even though Mr. Lopez has submitted several copies of this affidavit, it's [sic] significance has never been explained.

After a careful review of the motions, the responses, the replies, and all the evidence, and after several attempts to read and understand the Complaint and the RICO Order, the Court is convinced that there are no

material fact issues in dispute as to Johnson's involvement with Onshore. Johnson, like the others, is entitled to judgment as a matter of law.

B. Rio Bravo and Bert Gamble

Rio Bravo is an oil and gas operator and Bert Gamble is its president. Victor Russek is an independent oil and gas geologist who Rio Bravo has used on several occasions to screen and recommend oil and gas prospects and find participants for its drilling programs. Rio Bravo decides where to drill. It then seeks participants to help fund the drilling operations. Russek introduced Rio Bravo to Onshore as a potential participant in one of Rio Bravo's drilling programs. Rio Bravo entered into two agreements with Onshore whereby Onshore became one of several participants in two of Rio Bravos drilling programs. Rio Bravo has presented the agreements and the affidavit of Mr. Gamble. The evidence shows that Rio Bravo and Mr. Gamble had no contact with Onshore other than the two agreements. Neither owned any interest in Onshore and had no knowledge of, or contact with, the Onshore investors. Onshore was merely one of several passive "non-operator" participants in Rio Bravo's programs. Further, the deposition excerpts show that none of the Plaintiffs had any knowledge of Rio Bravo before they purchased their units and knew of no misrepresentations or fraud committed by these Defendants.

Once the moving party has shown that there is an absence of evidence to support the non-moving party's case, the burden shifts to the non-movants "to go beyond the pleadings and by [their] own [evidence] designate

'specific facts showing that there is a genuine issue for trial.' " *Celotex, supra* at 324; Fed. R. Civ. P. Rule 56(e).

Plaintiffs' response was filed late and for this reason alone it may be disregarded. It contains one exhibit which relates to the T.E.L. investment. The Court denied Plaintiffs' motion to file their second amended complaint and struck the second amended complaint which deals with the T.E.L. investment. Accordingly, this exhibit is irrelevant. Plaintiffs' response fails to contain any other evidence of "specific facts." Instead, Plaintiffs would have the Court deny summary judgment because,

> Plaintiffs, at a minimum, *can clearly establish* that [Rio Bravo] aided and abetted. . . . Plaintiffs contend that the evidence *will establish* [their] culpability. . . . [a]t the trial on the merits, Plaintiffs *will be able to clearly show*. . . . Plaintiffs must be given the opportunity to prove. . . . To require Plaintiffs to conclusively prove these matters prior to trial is not required. However, Plaintiffs contend that they will be able to prove their case if given the opportunity.

Mr. Lopez, Plaintiffs' counsel, is functioning under a misguided view of the law. In response to a motion for summary judgment alleging no evidence has been produced to show that the movant has committed any wrong, it is incumbent upon the non-movant to make a showing sufficient to establish the existence of an element essential to the party's case and on which that party will bear the burden of proof at trial." *Celotex*, at 322. Plaintiffs are required to respond to Defendants' motion with "specific facts showing that there is a genuine issue for

trial." *Id.* at 324 (cite omitted). Plaintiffs have not supplied the Court with any evidence to contradict the Defendants' motion. The Court has reviewed the documents presented by Rio Bravo. There is no evidence of wrongdoing. Accordingly, Rio Bravo's and Bert Gamble's motion for summary judgment shall be GRANTED on all claims.

D. Houston Petroleum Company and Richard O'Donnell

Houston Petroleum Company is an oil and gas drilling operation and O'Donnell is its President (hereafter both "HPC").

Plaintiffs have made allegations against HPC similar to those against Rio Bravo. Additionally, they allege a connection between HPC and Johnson based on alleged illegal kickbacks.

HPC has presented the affidavit of its president and deposition testimony to support its motion for summary judgment. HPC's motion and memorandum along with the undisputed evidence establish that HPC was not involved in the selling of the Onshore limited partnership interests to Plaintiffs or any other Onshore investors. HPC, like Rio Bravo, was a drilling operator. According to the subscription agreement, it is clear that HPC was not the General Partner of Onshore, and the Plaintiffs understood that HPC was not a seller of the Onshore interests. Additionally, HPC had no role in the management of Onshore and had no interest in Onshore. There is evidence that HPC issued checks to Johnson. There is no evidence of illegal kickbacks.

Plaintiffs' response was filed late and may be disregarded for that reason alone. Further, it contains only one exhibit, a rambling, stream of consciousness letter from one Defendant to another which proves nothing. HPC is mentioned in the letter but no facts can be gleaned from this exhibit. Further, the letter is not signed.

Again, as in the response to the Rio Bravo motion, Plaintiffs have failed to show specific facts which would tend to contradict the Defendants' proof. Defendants' evidence shows that none of the Plaintiffs believed HPC did anything with Onshore investors, let alone anything wrong. Plaintiffs' response again is only full of contentions that at trial they will prove their claims. Again, Mr. Lopez has failed to fulfill the Plaintiffs' burden to show specific facts. Accordingly, Defendants' motion for summary judgment on all Plaintiffs' allegations shall be GRANTED.

E. Rockwood Insurance Company

One of Rockwood's business activities is the issuance of investor bonds relating to entities such as Onshore. As Plaintiffs admit in their response to the RICO Order, Rockwood contracted with Onshore for finance related services. Rockwood issued the bonds as surety. The individual limited partner for whom the bond was issued would be designated as principal on the bond, and the entity advancing funds to the partnership would be the beneficiary of each bond. The purpose of the bonds was to provide a source of repayment for the lender if one or more of the limited partners defaulted on a promissory note executed by each limited partner to the lender, if the

terms and conditions of the bonds were otherwise met. In exchange for issuing the bonds, Rockwood received a premium from the partnership and an indemnification agreement from each limited partner.

The only RICO claims alleged against Rockwood are made under 18 U.S.C. § 1962(a), (b), (c) and (d). Nowhere in the Complaint or the RICO Response is it alleged that Rockwood made any affirmative misrepresentations or engaged in any predicate RICO acts.

In support of its motion for summary judgment Rockwood has presented the signed agreements it made with the limited partners. No Plaintiff has denied that he signed these agreements. Also, Rockwood has presented testimony showing that Rockwood had no involvement with the formation or management of Onshore and did not sell or have anything to do with the sale of Onshore units to the Plaintiffs or any of the investors. Rockwood owned no interests in Onshore.

Based upon the evidence presented, Rockwood contends that there is no evidence to show that Rockwood engaged in any RICO acts, made any misrepresentations to Plaintiffs or was involved in any way with the sale of the units of Onshore. Therefore, Defendants are entitled to summary judgment.

Rockwood also seeks judgment as a matter of law on its counterclaims against Plaintiffs Michael K. Topalian, Charles W. Anderson, Richard H. Manual, Bobby MacDonald, Jack E. Burroughs, Don W. Boyett, and MJM Ventures.

The declaration of Philip S. Kift establishes that among the amounts paid to CrossLand were payments relating to the obligations of those seven Plaintiffs to CrossLand. When payment was made, the promissory notes signed by the Plaintiffs were assigned to Rockwood. In addition, each of the Plaintiffs signed an Investor Bond Indemnification Pledge Agreement for Limited Partnership Financial Guarantee Bond upon which Rockwood relied in issuing the respective bonds. Among its own provisions, each indemnification agreement provided that the limited partner who executed the agreement,

> will protect, indemnify and save harmless [Rockwood] from and against any and all other expenses which [Rockwood] may sustain or incur under or in connection with the policy or bond issued to the Obligee or in connection with this Indemnification and Pledge Agreement, including but not limited to: (a) sums paid to the Obligee or its assigns to cure the [limited partner's] Default, under or to purchase, the [limited partner's] Note.

The Indemnification Agreement executed by each limited partner is a direct contractual relationship between Rockwood and the individual limited partner. Rockwood is entitled to judgment as a matter of law on this contractual claim regardless of any ruling on Rockwood's motion for summary judgment on the claims against it, because the claims against Rockwood do not arise out of the Indemnification Agreement. The amount of principal and interest to which Rockwood is entitled is set forth in the unsworn declaration by Philip S. Kift; and a reasonable attorney's fee to which Rockwood is entitled

is set forth in the unsworn declaration of Kevin Risley. In addition, Rockwood is now the owner and holder of the promissory notes executed by each of the seven Plaintiffs against whom Rockwood has asserted claims. The evidence establishes that Rockwood gave value for those notes and took the notes without notice of any claim or defense to the notes by any party. Therefore, Rockwood is entitled to judgment as a matter of law on the separate and independent ground of recovery based on the promissory notes.

In response, Plaintiffs' counsel, Mr. Lopez, submitted another variation of the "canned" brief he used to respond to the motions of HPC and Rio Bravo. Again, the response was submitted late. Again, there is no evidence of any specific facts to refute the Defendants' claims. Further, Mr. Lopez did not even address the part of the motion relating to Rockwood's claims against the individual Plaintiffs who have outstanding notes due to Rockwood.

Again, Mr. Lopez hopes the Court will deny the motion to dismiss. The Court has read all the evidence and therefore views all the motions as request for summary judgment. Therefore, the issue of dismissal is beside the point. Defendants have shown in their motion that there is no material issue of fact raised as to their lack of involvement in any schemes or conspiracies alleged by Plaintiffs. Defendants have shown that there is no factual dispute concerning the money the named Plaintiffs owe to Rockwood. Accordingly, Rockwood's motion for summary judgment shall be GRANTED as to all claims and counterclaims.

F. Robert E. Eckis, Jr. (Eckis)

Eckis has moved for dismissal based upon lack of personal jurisdiction. Plaintiffs asserted jurisdiction was proper under the provisions of section 27 of the Securities Exchange Act of 1934 ("the Act"). 15 U.S.C. § 78aa. It appears that the Court most likely does not have jurisdiction over Eckis. But this issue need not be ruled upon because summary judgment will be granted on the merits.

Eckis has moved for summary judgment based upon the lack of evidence showing he had any knowledge of alleged fraud by Onshore or that he had involvement in the sale of Onshore interests.

Eckis is the Chairman of the Board of Payment Plans, Inc., an underwriting manager for Rockwood. Eckis was contacted by Interdiscount, Ltd. ("IDL") to locate a bonding company for the Onshore investor bonds. Eckis contacted Rockwood, and with its agreement, Eckis issued the bonds in the name of Rockwood. Eckis was responsible for approving the individual investors to be bonded.

In December, 1984 Eckis had authority from Rockwood to issue sixty-six investor bonds relating to Onshore on which Rockwood was the surety. Attached to each bond was a power of attorney designating Eckis as attorney in fact for Rockwood. These powers of attorney expired as of December 31, 1984. The closing on the loans did not take place as scheduled. The bonds were reissued, signed by the investors and the closing on the loans was completed as scheduled in February, 1985. This appears to be a normal business practice, and no evidence to the contrary has been submitted. Further, all the investors,

including the Plaintiffs, signed several documents in connection with the loan and the bonds. Nothing appears to have been kept secret from the Plaintiffs. In fact, in their depositions, they admit their ignorance of any wrongdoing. They all state that they did not read any of the documents they received in connection with Onshore, including the ones they signed, or they scanned them, did not understand them but sought no explanation.

Eckis has shown that he was not a "seller" of the interests purchased by the Plaintiffs. The evidence shows that none of the deposed investors had any contact, with or knowledge of, Eckis before they purchased unit(s), and they did not purchase their unit(s) from Eckis. "Only a statutory 'seller' can be held liable under [15 U.S.C.] section 12 . . . " *Abell v. Potomac Insurance Co.*, 858 F.2d 1104, 1113 (5th Cir.), *reh. denied*, 863 F.2d 882 (5th Cir. 1988).

Eckis has shown that he had no control over the Onshore Limited Partnership, and thus he could not have violated Section 15 of the 1933 Act. 15 U.S.C. § 77o. None of the testimony presented indicates that Eckis had any involvement with Onshore other than providing investor bonds. Further, the claims relating to violations of section 10(b) and Rule 10b-5 were not made against Eckis as a "primary" or "aiding and abetting" party. No evidence has been presented to show Eckis had any involvement in these alleged violations.

In response to Eckis' motion, Plaintiffs have presented the "canned" brief with some additions. Although this time there are some attachments, they do not appear to contradict any facts in evidence. Nor do they put any

facts into dispute. It is not disputed that Eckis was the attorney-in-fact for Rockwood and arranged for Rockwood to provide the Onshore investor bonds. This is a normal business practice. Plaintiffs have not shown anything illegal in this practice. The fact that the investor bonds had to be re-signed is not illegal. Nor was it concealed from the Plaintiffs, who elected to sign the reissued documents. In fact, it appears that any ignorance of this fact on the part of the Plaintiffs is due to their own negligence in not reading the documents they signed.

Mr. Lopez contends in Plaintiffs' response, that even outsiders may become fiduciaries of investors. He cites *Dirks v. S.E.C.*, 463 U.S. 646, 655 (n.14 (1983). That case deals with facts so totally different from the facts here that the Court is at a loss as to why the case is cited. In *Dirks*, the facts concern an outsider's receipt of "material nonpublic information." Plaintiffs do not allege or show in the response that Mr. Eckis received any nonpublic information from Onshore insiders. Eckis received a copy of the offering memoranda and the signed investor bonds. The Plaintiffs also received this information. The fact that they chose to sign these documents without reading them does not attach liability to Mr. Eckis.

Mr. Lopez has attached an excerpt from a memorandum of law from another case in which Eckis and Rockwood were involved. Mr. Lopez states that this document shows Eckis is a witness against IDL in a suit in which Rockwood is "alleging violations by IDL of the RICO statute with regard to the bonding of the Promissory Notes for Texas Limited Partnerships." The Court has reviewed the memorandum. That case is an action for

recovery of money owed on a loan secured by a promissory note. The lawsuit was filed in New York. There is no mention of Texas and no mention of RICO violations. Obviously, this exhibit and the text alluding to it were added to the response to harass and mislead the Court, in violation of Rule 11.

In short, the Plaintiffs have asserted no knowledge of Mr. Eckis' involvement in any aspect of Onshore, and Mr. Lopez's response presents no factual dispute which could preclude summary judgment for this Defendant. Accordingly, Mr. Eckis' motion for summary judgment shall be GRANTED on all claims.

G. Joel A. Middlebrook

Middlebrook is *pro se*, thus her brief is concise. She contends that "Mr. Lopez told me . . . he did not believe I had done anything wrong. . . . [He told me] he was suing everyone who might have had anything to do with Onshore because he was not aware of who might have done anything wrong."

Mr. Lopez has not responded to this motion although it has been on file for almost two months. Since the motion is unopposed, and the Court has not found any facts to show Middlebrook's liability, Middlebrook's motion shall be GRANTED on the merits as to all claims.

Conclusion

For the reasons stated, the Court finds there is no evidence of fraud to support any of the Plaintiffs' complaints. It is, therefore

ORDERED that all Plaintiffs' federal and state claims against these Defendants are DISMISSED. It is further

ORDERED that these Defendants' motions for summary judgment are GRANTED. It is further

ORDERED that the Ehrman Defendants and Rockwood Insurance Company shall individually present forms of final judgment on or before October 20, 1989 as to their claims against the named Plaintiffs. The Order shall specifically set out the indebtedness of each named Plaintiff. It is further

ORDERED that Plaintiffs' motion for summary judgment is DENIED. It is further

ORDERED that the Court will entertain legitimate motions for sanctions. Counsel are advised to review recent Fifth Circuit case law concerning this issue.

The Court has reviewed Mr. Eckis's most recent motion concerning payment of his expenses. Mr. Lopez shall review and comply immediately with the Court's previous Order which stated, "Plaintiffs' counsel" shall pay the expenses. Eckis's motion is taken under advisement.

DONE this 4th day of October, 1989.

/s/ Norman W. Black
United States
District Judge

## APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| MICHAEL K. TOPALIAN, et al., | § | CIVIL |
| Plaintiffs | § | ACTION |
| | § | NO. |
| VS. | § | H-87-3826 |
| JOHN N. EHRMAN, et al., | § | |
| | § | |
| Defendants. | § | |
| | § | |

ORDER

(Filed Dec. 21, 1989)

Pending is the motion for summary judgment submitted by Defendants Russek Co. and Victor B. Russek (Russek). There is no response from the Plaintiffs although the time for response has long since passed.

Victor Russek is president of Russek Co. Russek was employed by Ehrman Investment Group (EIG) as a consulting geologist to recommend oil and gas drilling ventures. The employment continued from November 28, 1984 to March 1, 1986. His involvement with the limited partnership investments has been adequately detailed in the Court's Order of October 4, 1989. The Court, in an abundance of caution, has again reviewed this file and finds that there is no evidence to suggest that Russek is liable for any of the claims alleged by the Plaintiffs. The Court adopts and extends its previous statements in the

October 4th Order to include Russek Co. and Victor Russek. It is accordingly,

ORDERED that the Motion for Summary Judgment of Russek Co. and Victor Russek is GRANTED. It now appears that all the Defendants in this litigation have been granted summary judgment, and the Court has signed the final judgments submitted by the Defendants. It is therefore

ORDERED THAT all Plaintiffs' claims against all the Defendants having been fully adjudicated, this case is DISMISSED.

THIS IS A FINAL JUDGMENT.

Signed this 15th day of Dec., 1989 at Houston, Texas.

/s/ Norman W. Black
NORMAN W. BLACK
UNITED STATES
DISTRICT JUDGE

## APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| MICHAEL K. TOPALIAN, ET AL | § | CIVIL |
| | § | ACTION |
| Plaintiffs, | § | NO. |
| | § | H-87-3826 |
| VS. | § | |
| JOHN N. EHRMAN, ET AL | § | |
| | § | |
| Defendants. | § | |

DEFENDANTS' JOINT PRETRIAL ORDER

VII.

CONTESTED ISSUES OF FACT

A. Defendants' Contested Issues of Fact

1. Whether any misrepresentation of material fact were made by any of the defendants in the offer and sale of Units to the Plaintiffs, or any of them.

2. Whether any omissions to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, were used by any of the defendants to offer and sell the Units to the Plaintiffs, or any of them.

3. Whether any of the defendants engaged in any act, practice or course of business which operated as a fraud or deceit upon any of the Plaintiffs in connection with the offer and sale of the Units.

4. Whether any of the defendants knew or in the exercise of reasonable diligence could have known of the untruths or omissions alleged in the Complaint at the time of the offer and sale of the Units to each of the plaintiffs.

5. Whether any of the Plaintiffs knew at the time of their respective purchase of the Units of the untruths or omissions allegedly used by the defendants, or any of them, in the offer and sale of the Units.

6. The respective dates that each of the plaintiffs knew or should have known that the alleged misrepresentations and omissions were not true.

7. The respective dates each of the plaintiffs discovered, or in the exercise of reasonable care, should have discovered the untruths or omissions alleged.

8. The respective dates that each of the plaintiffs received the private placement memorandums.

9. Were offers and sales of Units made to more than 35 nonaccredited investors?

10. Were offers and sales of the Units made by means of a public solicitation?

11. Whether any of the defendants participated in a conspiracy to defraud any of the plaintiffs.

12. Whether the acts alleged in the Complaint as "predicate acts" were acts performed in furtherance of a conspiracy.

13. Whether any of the acts alleged to have [sic] performed by any of the defendants were intended to defraud any of the plaintiffs.

14. Whether any of the plaintiffs in purchasing any of the Units relied on any of the acts alleged to have been performed by the defendants to defraud the plaintiffs.

15. Whether the plaintiffs have suffered any damages as a result of any illegal act on the part of any of the defendants.

16. The amounts that the plaintiffs/counter-defendants are indebted to Onshore and EIG on the promissory notes the plaintiffs/counterdefendants executed in connection with their purchase of Units, including interest and reasonable attorney's fees.

17. Whether this action was brought as part of an effort by plaintiffs McDonald and Manuel to harass and/or coerce Ehrman and EIG.

18. Whether any of the defendants engaged in any violations of the RICO Act in connection with the matters alleged by the plaintiffs.

19. Whether any of the Defendants had a fiduciary duty to any of the plaintiffs.

20. Whether any of the Defendants violated any fiduciary duty to any of the plaintiffs.

B. Rockwood's Contested Issues of Fact

1. Whether Rockwood made any misrepresentations of any of the plaintiffs?

2. If there were any violations of state or federal securities laws committed by any party, did Rockwood have knowledge of any such violations?

3. Whether Rockwood ever acquired or maintained an interest in Onshore?

4. Whether Rockwood ever conducted or participated in the operation of Onshore?

5. Whether Rockwood ever entered into an agreement to commit an act of mail fraud, wire fraud, or securities fraud?

6. What is the outstanding balance on the promissory notes signed by the seven Counter-Defendants?

7. What is the amount of payments and expenses incurred by Rockwood in connection with the issuance of investor bonds on which the Counter-Defendants are principals?

8. What is a reasonable attorney's fee for the legal services performed on behalf of Rockwood in this case?

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## APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| MICHAEL K. TOPALIAN, ET AL | * | CIVIL |
| | * | ACTION |
| Plaintiffs, | * | NO. |
| | * | H-87-3826 |
| VS. | * | |
| | * | |
| JOHN N. EHRMAN, ET AL | * | |
| | * | |
| Defendants. | * | |
| | * | |

DEFENDANTS' JOINT PRETRIAL ORDER

VI.

ADMISSIONS OF FACT

A. Defendants' Admissions of Fact.

1. Onshore is a limited partnership formed under the laws of the State of Texas.

2. EIG is a Texas corporation.

3. Defendant John N. Ehrman ("Ehrman") was President and a director of EIG at all material times.

4. Defendant Wayne M. Byles ("Byles") resigned as a general partner of Onshore in Dec. 1984.

5. W. Roderick Johnson ("Johnson") and EIG replaced Byles as general partners of Onshore.

6. The Onshore Memorandum dated September 30, 1984 represented Byles was general partner of Onshore.

7. The Onshore Memorandum dated November 30, 1984 represented that EIG and Johnson were general partners of Onshore.

8. The Plaintiffs purchased their respective Units in Onshore on the following dates:

| Plaintiff | Date of Purchase |
|---|---|
| Michael K. Topalian* | November 8, 1984* |
| Warren Fienga | November 8, 1984 |
| Roy Jacobs | November 3, 1984 |
| Richard Orozco | November 29, 1984 |
| Juan Garcia-Quiroga | October 30, 1984 |
| Charles W. Anderson | November 29, 1984 |
| Francis D. Covert | November 9, 1984 |
| Richard H. Manuel | November 30, 1984 |
| Jack E. Burroughs | November 8, 1984 |
| Don W. Boyett | November 30, 1984 |
| Bobby W. McDonald | November 30, 1984 |
| Jean Steubing | January 10, 1985 |
| Charles F. LaCelle | January 24, 1986 |
| Richard Mikles | January 10, 1985 |
| MJM Ventures | January 10, 1985 |

9. The offering of the Units was not registered with the Securities and Exchange Commission.

10. The Memorandums represented that the offering of the Units was being made pursuant to the provisions of Regulation D 1 promulgated by the Securities and Exchange Commission.

11. The November 30, 1984 Memorandum states that the offering of the Units was to terminate on December 31, 1984.

---

* Michael K. Topalian purchased additional units on October 16, 1985.

12. The September 30, 1984 Memorandum was delivered to the investors who purchased their Units prior to December 30, 1984 at or before the time they subscribed to their respective Units.

13. The November 30, 1984 Memorandum was delivered before May 1, 1985 to a11 of the investors who had previously purchased Units from Onshore.

14. In January, 1985, the persons who had previously subscribed to Units. including several of the plaintiffs, were given an option by Onshore to either cancel or re-confirm their purchase of such Units.

15. The subscriptions of investors who subscribed to Units in 1984, and who elected not to re-confirm the purchase of such Units were cancelled.

16. The Units were offered to prospective investors at the subscription price of $30,000.00 each.

17. Subscribers to the Units could either pay cash for their Units or could execute a promissory note for an amount equal to the purchase price of the Units.

18. The promissory notes of subscribers to the Units were used by Onshore to secure a loan to fund its operations.

19. The plaintiffs Michael K. Topalian ("Topalian"), Warren B. Fienga ("Fienga"), Roy Jacobs, Jr. ("Jacobs"), Richard Orozco ("Orozco"), Juan Garcia-Quiroga ("Quiroga"), Francis D. Covert ("Covert"), Don W. Boyett ("Boyett"), Bobby W. McDonald ("McDonald"), Charles W. Anderson ("Anderson"), Richard H. Manuel ("Manuel") and Jack E. Burroughs ("Burroughs") were among the subscribers to the Units who executed promissory notes made payable to Onshore for the full purchase price of the respective Units to which they subscribed.

20. On or about January 31, 1985, Defendants Johnson and EIG entered into a financing agreement on behalf of Onshore to secure a loan of $4,175,000 from Defendant Interdiscount Ltd. ("Interdiscount").

21. The loan to Onshore was secured by the assignment to Interdiscount of the promissory notes executed by certain of the plaintiffs and other investors in Onshore.

22. Defendant Rockwood Insurance Company ("Rockwood") issued bonds as a form of insurance in the event of nonpayment of the promissory notes.

23. On or about February 25, 1985. Interdiscount assigned its interest in the Onshore note, the promissory notes executed by the Onshore investors and Interdiscount's rights under the Rockwood investor bonds to CrossLand Federal Savings Bank ("Cross Land"), a financial institution located in New York.

24. Several of the investors, including six of the plaintiffs, 1 defaulted in paying the amount due on the promissory notes they executed in connection with their purchase of their respective units in Onshore.

25. Rockwood paid the amount due Cross Land Savings on the promissory notes payable to Onshore which Rockwood had insured.

26. Rockwood brought suit and got judgment on April 8, 1988 for $3,428,594.94 against Onshore and EIG on the amount due on the promissory notes Rockwood had insured in connection with the funding of Onshore, plus a judgment against Ehrman in the amount of $165,336.99.

27. The assets of Onshore, including the royalties from wells in which Onshore has participated, have been assigned to Rockwood to secure payment of its judgment against Onshore.

28. That the promissory notes executed by the subscribers to the Onshore Units became due and payable in full to Cross Land Savings on October 31, 1985.

29. That on or about September 26, 1984, Onshore entered into an agreement with Defendant Houston Petroleum Company ("H.P.C.").

---

## APPENDIX G

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF TEXAS**
**HOUSTON DIVISION**

| | | |
|---|---|---|
| MICHAEL K. TOPALIAN, ET AL., | : | |
| PLAINTIFFS, | : | C.A. NO. |
| VS. | : | H-87-3826 |
| JOHN N. EHRMAN, ET AL., DEFENDANTS. | : | |

DEPOSITION OF JOEL A. MIDDLEBROOK
FEBRUARY 8 & 9, 1989
VOLUME II

ORIGINAL

* * *

[p. 466] A He was a lawyer with First Tech.

Q With First Tech?

A Uh-huh.

Q And, I believe, Mr. Lopez spent some time on First Tech on the first day of this deposition?

A Yes.

Q Do you recall a month or a year in your association with Onshore that you first became aware of Houston Petroleum Company?

A It would have to be in the fall of '84.

Q How about Mr. O'Donnell? The same?

A Same.

Q And what was the occasion that brought about your learning of Houston Petroleum Company?

A Well, one time I went to their office, before they started the program, and visited with them. They had several people there that showed the office and what they were going to drill, and so on. It was a kind of a dog-and-pony show for potential investors that John had set up and did.

Q Okay. And were you by yourself?

A Yes; I went by myself.

Q You did? Was anyone else at the meeting besides –
[p. 467] A Oh, yes; there were other people there.

Q Okay. Who was there?

A I don't know their names. They were just different prospective investors that showed up.

Q Okay. Was Ehrman there?

A Uh-huh.

Q Okay. Anyone else associated with Onshore?

A I don't remember. Rod might have been there; I'm not sure. He may or may not. I don't know; I don't remember. I know John was there; and a bunch of potential investors were there.

Q And who made the presentation for Houston Petroleum Company?

A One of their geologists. I don't know his name. I have forgotten his name.

Q Was he the only individual who spoke?

A No. I'm sure everybody had a little something to say.

Q Do you recall the prospect that was presented at that time?

A It was the one that was in the notebook, the prospectus.

Q You don't recall the name?

* * *

## APPENDIX H

IN THE UNITED STATED DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| MICHAEL K. TOPALIAN, ET AL., | § | |
| | § | CIVIL |
| Plaintiffs | § | ACTION |
| | § | NO. |
| VS. | § | H-87-3826 |
| JOHN N. EHRMAN, et al., | § | |
| | § | |
| Defendants. | § | |
| | § | |

ORDER

Pending are the various motions to compel, for protection and for sanctions of all parties. The parties have previously been ordered to complete discovery in a professional manner. It appears that the disputed matters must be set out on the record. Therefore it is

ORDERED that the Court shall conduct a hearing on all pending motions on August 18, 1989 at 10:30 a.m. At that time all counsel *and their clients* will appear. Corporate clients will present a representative with settlement authority. All individual Plaintiffs shall be present. The Court will hear sworn testimony from counsel on the facts causing the discovery disputes. It is further

ORDERED that any scheduled discovery shall continue during this time.

Signed this 7th day of June, 1989 at Houston, Texas.

/s/ Norman W. Black
NORMAN W. BLACK
UNITED STATES DISTRICT
JUDGE

(2)

No. 91-1973

Supreme Court, U.S.
FILED
JUL 2 1992
OFFICE OF THE CLERK

In The

# Supreme Court of the United States

October Term, 1992

MICHAEL K. TOPALIAN, WARREN B. FIENGA, ROY JACOBS, JR., RICHARD OROZCO, JUAN GARCIA-QUIROGA, JEAN STEUBING, CHARLES W. ANDERSON, FRANCIS D. COVERT, RICHARD H. MANUEL, JACK E. BURROUGHS, DON W. BOYETT, BOBBY W. McDONALD, CHARLES F. LACELLE, RICHARD D. MIKLES, AND MJM VENTURES,

*Petitioners,*

v.

JOHN N. EHRMAN, EHRMAN INVESTMENT GROUP, INC., W. RODERICK JOHNSON, W. RODERICK JOHNSON, P.C., RICHARD O'DONNELL, HOUSTON PETROLEUM CO., INC., JOEL A. MIDDLEBROOK, JOEL A. MIDDLEBROOK, CPA, VICTOR B. RUSSEK, RUSSEK, CO., BERT GAMBLE, RIO BRAVO OIL CO., INC., ROCKWOOD INSURANCE CO. AND ROBERT E. ECKIS, JR.,

*Respondents.*

**Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## RIO BRAVO OIL CO., INC. AND BERT GAMBLE'S ("RESPONDENTS") BRIEF IN OPPOSITION

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## QUESTION PRESENTED

1. Does the record that was before the appellate and trial court support the grant of summary judgment for Rio Bravo Oil Co., Inc. and Bert Gamble when Petitioners failed to set forth specific facts and establish a genuine issue worthy of trial?

## INTERESTED PARTIES

### PETITIONERS

MICHAEL K. TOPALIAN, WARREN B. FIENGA, ROY JACOBS, JR., RICHARD OROZCO, JUAN GARCIA-QUIROGA, JEAN STEUBING, CHARLES W. ANDERSON, FRANCIS D. COVERT, RICHARD H. MANUEL, JACK E. BURROUGHS, DON W. BOYETT, BOBBY W. McDONALD, CHARLES F. LACELLE, RICHARD D. MIKLES AND MJM VENTURES, A PARTNERSHIP

### RESPONDENTS

JOHN N. EHRMAN, EHRMAN INVESTMENT GROUP, INC., W. RODERICK JOHNSON, W. RODERICK JOHNSON, P.C., RICHARD O'DONNELL, HOUSTON PETROLEUM CO., INC., JOEL A. MIDDLEBROOK, JOEL A. MIDDLEBROOK, CPA, VICTOR B. RUSSEK, RUSSEK CO., BERT GAMBLE, RIO BRAVO OIL CO., INC.,[1] ROCKWOOD INSURANCE CO. AND ROBERT E. ECKIS, JR.

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[1] Rio Bravo Oil Co., Inc. is a subsidiary of the Wichita River Oil Corporation.

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No. 91-1973

In The

# Supreme Court of the United States

October Term, 1992

MICHAEL K. TOPALIAN, WARREN B. FIENGA, ROY JACOBS, JR., RICHARD OROZCO, JUAN GARCIA-QUIROGA, JEAN STEUBING, CHARLES W. ANDERSON, FRANCIS D. COVERT, RICHARD H. MANUEL, JACK E. BURROUGHS, DON W. BOYETT, BOBBY W. McDONALD, CHARLES F. LACELLE, RICHARD D. MIKLES, AND MJM VENTURES,

*Petitioners,*

v.

JOHN N. EHRMAN, EHRMAN INVESTMENT GROUP, INC., W. RODERICK JOHNSON, W. RODERICK JOHNSON, P.C., RICHARD O'DONNELL, HOUSTON PETROLEUM CO., INC., JOEL A. MIDDLEBROOK, JOEL A. MIDDLEBROOK, CPA, VICTOR B. RUSSEK, RUSSEK, CO., BERT GAMBLE, RIO BRAVO OIL CO., INC., ROCKWOOD INSURANCE CO. AND ROBERT E. ECKIS, JR.,

*Respondents.*

**Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## RIO BRAVO OIL CO., INC. AND BERT GAMBLE'S ("RESPONDENTS") BRIEF IN OPPOSITION

Respondents, Rio Bravo Oil Co., Inc., (Rio Bravo) and its President Bert Gamble (Gamble) respectfully request

that this Court deny the petition for writ of *certiorari*, seeking review of the judgment of the United States Court of Appeals for the Fifth Circuit in this case. The opinion of the Fifth Circuit is reported at 954 F.2d 1125 (5th Cir. 1992).

## STATEMENT OF THE CASE

Petitioners fail to raise any special or significant reasons to warrant granting their petition for writ of certiorari. The arguments made by Petitioners involve issues that are well settled and do not involve conflicting decisions between the United States courts of appeals. This statement will describe the pertinent facts omitted from Petitioners' statement of the case.

### A. Factual Background

Onshore Exploration, Ltd., 1984 Mid-Year Drilling Program ("Onshore") was a limited partnership formed in 1984 under Texas law to participate in oil and gas drilling ventures. The general partners of Onshore decided to raise capital for the venture by selling limited partnership units. Two offering memoranda, which explained the risks of investing in Onshore, were made available to investors. The offering of units in Onshore was made primarily to accredited investors pursuant to Rule 506 of Regulation D (17 C.F.R. Sec. 230.506) promulgated by the Securities & Exchange Commission. Each petitioner signed various subscription documents in which they acknowledged that they had read the Offering

Memorandum and understood the risks of this particular investment.

Rio Bravo's only connection with Onshore is a contractual relationship. On or about December 17, 1984, Onshore and Rio Bravo entered into two letter agreements and two operating agreements covering drilling on the Southwest Cuero and Sheriff Prospects. Rio Bravo drilled these wells in accordance with the terms of the respective agreements. Onshore paid some but not all of the amounts owed Rio Bravo under the agreements.

This suit was filed in December 1987, by fifteen of seventy-seven investors in Onshore alleging various securities fraud, RICO and other pendent state law claims in connection with the organization of Onshore. Petitioners claim they were induced to buy units as a result of oral misrepresentations made to them prior to their purchase. Petitioners sought recovery against twenty-four defendants, including Rio Bravo and its President, Bert Gamble.

On March 20, 1989, the parties agreed to, and the District Court signed, a Discovery & Scheduling Order which established various deadlines including: (i) June 15, 1989, for filing of dispositive motions and (ii) July 10, 1989, for filing responses to such motions. This order also scheduled a hearing for 9:30 a.m. on July 28, 1989, to consider any pending motions (B. 1-9)[2].

---

[2] The Appendix to the Petition is referred to as "A." The Appendix to this Brief in Opposition is referred to as "B." The Petition is referred to as "P."

Discovery undertaken in this action has been extensive, voluminous and costly. A summary of the discovery includes:

1. Document requests were exchanged between each of the fifteen petitioners and at least seven of the respondents, pursuant to which thousands of pages of documents were produced and examined.

2. Petitioners and all respondents each propounded and answered multiple sets of interrogatories.

3. Petitioners submitted voluminous requests for admissions to various respondents, including 158 to Victor B. Russek, 233 to W. Roderick Johnson, and 621 separate requests for admissions to John N. Ehrman, the actual organizer of Onshore.

4. Oral depositions were taken of twelve of the fifteen petitioners, as well as several investors who were not parties to this suit.

5. Petitioners took the oral depositions of representatives of Rio Bravo, Houston Petroleum Company and Rockwood Insurance. They deposed the former general partners of Onshore, as well as Ms. Middlebrook and Mr. Russek who had introduced Rio Bravo to Onshore and Mr. Ehrman.

6. Petitioners also deposed Frank Legio, who had performed an audit of the Rio Bravo accounts.

Despite the extensive discovery taken over more than a year and involving tens of thousands of pages of documents and deposition transcripts, Petitioners failed to

produce any deposition testimony or any document in response to the Motion for Summary Judgment (the "Motion") filed by Rio Bravo and Gamble (B. 10).[3]

**B. Procedural Background**

On June 15, 1989, after completion of discovery and pursuant to the Agreed Discovery and Scheduling Order of March 20, 1989, Rio Bravo and Gamble filed the Motion (B. 10). The Motion was supported by competent evidence in the form of sworn affidavits and deposition excerpts. The affidavit of Bert Gamble contained testimony that neither Rio Bravo nor Gamble was involved in (1) the organization, operation, or internal workings of Onshore, (2) the raising of capital by Onshore or (3) the selling of limited partnership interests in Onshore. Gamble further swore that neither Rio Bravo nor he had ever acquired, maintained, or owned any interest in Onshore or in any way controlled Onshore (B. 14-18). Additionally, excerpts from the deposition testimony of numerous Petitioners established that they had never discussed their investment in Onshore with Gamble or Rio Bravo and had no personal knowledge regarding the claims against Rio Bravo and Gamble. Rio Bravo and Gamble's evidence was substantially more than a "general denial of wrongdoing" (P. 14 ¶ 1).

---

[3] A copy of the Motion and supporting affidavit (without its exhibits) is included in the appendix as B. 10-18. A copy of Petitioners' reply is included as B. 19-28. A copy of Rio Bravo and Gamble's response to Petitioners' reply (without its exhibits) is included as B. 29-37.

On July 28, 1989, Petitioners filed an untimely Response (the "Response" (B. 19-28)) to the Motion which the trial court agreed to consider (A. 76). Despite the extensive discovery which had gone on in this case, the Response was not supported by any affidavits or depositions, did not allege any deficiency in the form or substance of the Motion, and did not direct the trial court to any portion of the record which would establish a disputed issue of material fact. The Response contained only references to the pleadings and unsworn assertions of what Petitioners would prove if given the chance to proceed to trial. As noted by the district court, Petitioners failed to "supply the Court with any evidence to contradict the [Rio Bravo and Gamble] Motion" (A. 63-65). As a result, on October 24, 1989, the district court granted summary judgment in favor of Rio Bravo and Gamble (A. 66). The Fifth Circuit panel affirmed the district court's decision, concluding that Petitioners failed to point out specific facts or evidence which established a genuine issue worthy of trial (A. 10-25).

For the first time on appeal and again before this Court, Petitioners point to evidence not part of the record before the district court to support their position on appeal. Specifically, Petitioners argue that a draft of a proposed pre-trial order and an SEC enforcement action against two of the respondents (not Rio Bravo or Gamble) establish the existence of material fact issues which should have prevented the entry of summary judgment as to all respondents. The Fifth Circuit panel properly refused to consider such "evidence."

## REASONS THE PETITION SHOULD BE DENIED

### I. THIS IS AN APPEAL FROM THE GRANT OF SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS BY A DISTRICT COURT WHICH APPLIED THE PROPER STANDARD IN DECIDING THE CASE.

#### A. PETITIONERS FAILED TO ESTABLISH A LEGAL OR FACTUAL BASIS FOR DENIAL OF RESPONDENTS' MOTION FOR SUMMARY JUDGMENT

The grant of summary judgment in federal court is governed by Fed. R. Civ. P. 56. Specifically, Rule 56(c) provides the standard upon which summary judgment is to be granted:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Few rules have received as much judicial consideration as Rule 56. This Court has recognized that Rule 56(c) places the burden on the moving party to show that no genuine issue of material fact exists. A "material fact" is one that might affect the outcome of a suit due to its legal import. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-258 (1986).

Rule 56 must be read not just to protect non-movants with real claims, but also to protect the rights of movants to dispose of baseless claims. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). This Court has recognized that under Rule 56(c), the movant has the initial responsibility of

informing the Court of the basis for its motion by identifying those portions of the record which reveal that there is no genuine fact issue. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Once a movant has done this, the burden shifts to the opposing party to submit affidavits or other competent evidence of specific facts to establish that there is a genuine issue of material fact for trial.

The non-movant must do more than show that there is some "metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586; *Anderson*, 477 U.S. at 249-50. Unsupported allegations are insufficient to either support or defeat a motion for summary judgment. *Galindo v. Precision Am. Corp.*, 754 F.2d 1212, 1216 (5th Cir. 1985). A party opposing a motion for summary judgment may not rest on the mere allegations or denials of his pleadings, but must set forth specific facts upon which there is a genuine issue for trial. Further, the party opposing a summary judgment motion does not have the right to withhold his evidence until trial. *Anderson*, 477 U.S. at 248-49; *First Nat'l Bank v. Cities Service Co.*, 391 U.S. 253, 288 (1968); *C.F. Dahlberg & Co., Inc. v. Chevron U.S.A., Inc.*, 836 F.2d 915, 920 (5th Cir. 1988).

Petitioners' sole legal argument seems to be that the trial court erroneously applied the decision in *Celotex, supra*. The major holding in *Celotex* is that a defendant, as a party moving for summary judgment, need not offer affidavits in support of a motion for summary judgment. Additionally, this Court clarified the relationship between summary judgment procedure and the burden of proof, saying:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who failed to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the non-moving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

*Celotex*, 477 U.S. at 322-23.

Unlike the movant in *Celotex*, Rio Bravo, Gamble and the other respondents produced specific, affirmative evidence that negated the Petitioners' claims against them.

In response, Petitioners did not contradict any portion of the affidavit or deposition excerpts which supported the Motion. The Response did not allege any deficiencies in the factual or evidentiary basis for the Motion. The Response did not offer any evidence that there was a genuine issue for trial. After months of discovery, generating tens of thousands of pages of depositions and documents, Petitioners were unable to produce any evidence or testimony from the Petitioners or anyone else to support their allegations against Rio Bravo or Gamble.

Contrary to the requirements of Rule 56, Petitioners refused to submit evidence in response to the Motion, promising instead, that they would have evidence at trial sufficient to prove their allegations. The Response was replete with phrases such as: "Plaintiffs contend that the evidence will establish," (B. 22), "Plaintiffs possess evidence which will establish . . . " (B. 22); "At the trial on the merits, Plaintiffs will be able to clearly show . . . " (B. 22); "Plaintiffs will show at trial . . . " (B. 25). Nowhere, however, have Petitioners told the trial court, the Court of Appeals, or this Court, for that matter, what this evidence might be nor how they would prove their allegations.

As the court said in *McLemore v. Landry,* 668 F. Supp. 531 (N.D. La. 1987) *aff'd,* 898 F.2d 996 (5th Cir. 1990) *cert. denied,* 111 S. Ct. 428 (1990):

> . . . At some point in every case, plaintiffs must lay down the shield of nonspecific possibilities and come forth with specific facts, which, if proved, will actually establish liability on the part of the defendants. For these plaintiffs, that time is now. They have failed to do so after having been granted every reasonable opportunity.

For Petitioners that time was when the Response was filed. They failed to do so, and summary judgment was appropriate.

## B. THE DOCUMENTS THAT PETITIONERS ALLEGE CREATED DISPUTED FACT ISSUES ARE NOT PART OF THE SUMMARY JUDGMENT EVIDENCE, ARE NOT EVIDENTIARY AND DO NOT CREATE A FACT ISSUE

For the first time on appeal and again before this Court, Petitioners assert that the existence of fact issues is established by (1) an SEC enforcement action against two of the other respondents, and (2) by a draft of a proposed pre-trial order filed by all respondents while summary judgment motions were pending. None of these arguments was presented to the trial court and the documents referred to were not part of the record before the trial court. The documents referred to in Petitioners' brief do not constitute "evidence" as required by Rule 56, and none of them shows the existence of any disputed fact issues involving Rio Bravo and Gamble.

An important principal governing review of summary judgments, which has apparently been ignored by Petitioners, is that a reviewing court cannot enlarge upon the record that was before the district court at the time summary judgment was granted. Evidence not presented to the trial court for consideration of or in response to a motion for summary judgment are never properly before the reviewing court on an appeal from the judgment granting the motion. *Munoz v. International Alliance of Theatrical Stage Employees*, 563 F.2d 205, 209 (5th Cir. 1977); *Auto Drive-Away v. ICC*, 360 F.2d 446 (5th Cir. 1966).

Neither Rio Bravo nor Gamble were parties to the SEC enforcement action and no claims of wrongdoing were made against Rio Bravo or Gamble. Those pleadings

cannot constitute evidence that should have prevented the trial court in this case from entering summary judgment as to Rio Bravo or Gamble. The mere filing of a lawsuit against another party is not competent evidence of any wrongdoing by that party, let alone other entities. Any reference by Petitioners to that enforcement action is irrelevant and designed to mislead the Court.

Next, Petitioners suggest that a draft of a proposed pretrial order offered by all respondents after Rio Bravo and Gamble's summary judgment motion was filed, but before it was granted, is proof of disputed fact issues. Petitioners' assertion is wrong because the proposed order was no more than an informal pleading.

In *Taylor v. Allis Chalmer Mfg. Co.*, 320 F. Supp. 1381 (E.D. PA. 1969), *affirmed* 436 F.2d 416 (1970 *per curiam*), the court held that statements made by a party in its pre-trial order were not admissions which could be used against the party. The *Taylor* court recognized an important distinction between formal pleadings, such as the complaint or answer, which frame the issues, and less formal pleadings which are intended to provide some guidance to the court in the management of the case. The *Taylor* case was cited with approval by this Court in *Hardy v. Johns-Manville Sales Corp.*, 851 F.2d 742, 746 (5th Cir. 1988).

In the summary judgment context, Rule 56 sets the standard for the type of evidentiary basis necessary to raise a fact issue. In *Helmich v. Kennedy*, 796 F.2d 1441 (11th Cir. 1986), the court held that statements of fact in a brief filed in a trial court could not be considered in determining whether a fact issue existed to defeat summary judgment. The court noted that the brief was to

serve an entirely different function than an affidavit, which was specifically recognized under Rule 56, and that such statements, even though made by an agent of the party, could not be considered summary judgment evidence. *See Garza v. Chicago Health Clubs, Inc.*, 347 F. Supp. 955, 964 (N.D. Ill. 1972) (statements made in a brief, but not in affidavit form, cannot be given weight on motion for summary judgment); *Leggieri v. Mealo*, 484 F. Supp. 719, 721 (E.D. Pa. 1980) (statements on the record by counsel are not evidence and may not substitute for the presentation of evidence required in considering the motion for summary judgment). *See also, Dartez v. Owens-Illinois, Inc.*, 910 F.2d 1291 (5th Cir. 1990) (statements in post-trial brief are not judicial admissions); *City of Cleveland v. Cleveland Electric Illuminating Co.*, 538 F. Supp. 1257, 1280 (N.D. Ohio 1980) (proposed findings of fact are informal suggestions for the assistance of the court, not formal pleadings, and do not constitute admissions).

The pre-trial memoranda filed by the parties in this case do not constitute summary judgment evidence. They were provided by the parties, at the request of the court, to guide the court on what issues would be presented at trial, if a trial were required.

The purpose of a pre-trial order is to reveal the lawyer's theory of the case and issues believed to be in contention in order to aid the court in determining what matters should be considered at the conference itself. *Ramsey v. Mellon Nat'l Bank & Trust Co.*, 33 F.R.D. 324 (W.D. Pa. 1963). Any admissions and statements made are only binding following entry by the court of a pre-trial order. *Taylor*, 320 F. Supp. at 1381. In the case at bar, no such entry was made by the trial court. Nor was any

order entered that otherwise indicated the trial court's adoption of either party's memoranda.

A determination by this Court that fact issues identified in a proposed pre-trial order constitute evidence or admissions for summary judgment purposes would defeat the purpose of Rule 16 which is to provide a mechanism for fostering better, more efficient trials. *Flannery v. Carroll*, 676 F.2d 126, 129 (5th Cir. 1982). As stated by the court in *Laird v. Air Carrier Engine Service, Inc.*, 263 F.2d 948, 954 (5th Cir. 1959):

> If counsel . . . must hold himself back for fear that if the hearing is unproductive or the result is abortive, the client may be faced with the prospect that his defender has suddenly become the admission-witness against him, pre-trial will stagnate. Counsel will be muzzled. The informal give and take, the exploration of areas of agreement and disagreement, now so productive of stipulation between responsible advocates, will have to end.

There is nothing in Rule 16 which would sanction the use of a proposed pre-trial order as an admission or other type of evidence under Rule 56. Such use, if proper at all, should occur only after the pre-trial conference and the actual entry of a pre-trial order. *Taylor, supra.* Here, no pre-trial order was ever signed, so Petitioners' argument is misplaced.

## II. THE FIFTH CIRCUIT PROPERLY DETERMINED THAT PETITIONERS' CLAIMS UNDER SECTION 10(b) OF THE SECURITIES ACT OF 1934 AND SECTIONS 12(1) AND 12(2) OF THE SECURITIES ACT OF 1933 WERE TIME BARRED

Contrary to Petitioners' assertion, neither the Fifth Circuit nor the District Court held that "disclaimers in an offering memorandum served to absolutely shield Respondents from liability" under the securities laws (P. 18). What the lower courts did hold is that when presented with uncontroverted evidence which demonstrates that Petitioners discovered or should have discovered the alleged fraudulent conduct at the time Petitioners purchased their investment, it is proper to determine the running of limitations from the date of that event. Such a determination is consistent with the law of every circuit. *See: Kramas v. Security Gas & Oil Inc.*, 672 F.2d 766 (9th Cir. 1982) cert. denied 103 S. Ct. 444, 459 U.S. 1035, 74 L. Ed. 2d 600 (1982) (when uncontroverted evidence demonstrates that a party discovered or should have discovered the fraudulent conduct, summary judgment is proper); *Anixter v. Home-State Production Co.*, 939 F.2d 1420 (10th Cir. 1991) *modified* 947 F.2d 897 (10th Cir. 1991) (a party must plead and prove facts showing claim was timely to both one and three year limitation periods).

In *Lampf, Pleva, Lipkind, Prupis and Petrigrow v. Gilbertson*, ___ U.S. ___, 111 S. Ct. 2773, 115 L. Ed. 2d 321 (1991), the Court determined that the applicable limitations period in a private suit brought pursuant to § 10(b) of the Securities Act of 1934 (15 U.S.C.A. § 78(b)) is the earlier of one year after the discovery of facts constituting

the violation or within three years after the violation. In addition, the Court held that the three-year limitation is designed to serve as a cut-off and, therefore, tolling principles do not apply. Finally, without discussion, the Court applied its decision retroactively making it clearly applicable to this case. Similarly, §§ 12(1) and 12(2) of the Securities Act of 1933 (15 U.S.C.A. §§ 77l(1) and (2) (1981)) are subject to a one and three-year limitation period. 15 U.S.C.A. § 77m.

Any alleged violations of the Securities Act occurred before Petitioners signed their Subscription Agreement and other documents. Since the Subscription Agreement contained disclosures and information contrary to what Petitioners had previously been told, Petitioners were charged with notice and under a duty to exercise reasonable diligence to investigate the alleged wrongdoing.

*Kennedy v. Josephthal & Co.*, 814 F.2d 798 (1st Cir. 1987) is instructive. In that case, plaintiffs purchased shares of a limited partnership involved in the mining of coal. The Offering Memorandum disclosed not only the high degree of risk but the fact that, the partnership "would, in all likelihood, utterly fail as a viable coal mining operation." *Id.* at 801. Plaintiffs claimed they relied on oral statements which described it as a more positive, profitable and safe venture. Rejecting the argument that the defendant's continuing misrepresentations prevented discovery of the fraud, the court stated:

> Appellants need not, however, have fully discovered the extent of the fraud before they were on notice that something may have been amiss. Inquiry notice is triggered by evidence of the

> possibility of fraud, not full exposition of the scam itself.

*Id.* at 802. The court thus found that appellants were on notice when they examined the Offering Memorandum and compared it to their broker's contrary statements. Limitations expired one year later and barred their suit.

The District Court correctly recognized that all Petitioners except Steubing, Lacelle, Mikles and MJM Investments purchased their units in Onshore on or before November 30, 1984. Because Petitioners' lawsuit was not filed until December 3, 1987, the Securities Act claims of all but four Petitioners are absolutely barred.

As to the remaining four Petitioners, their claims were not brought within one year from the date of discovery. The District Court, relying on undisputed evidence in the record, determined that these Petitioners should have discovered the alleged misrepresentations no later than May 1, 1985, when they signed the Subscription documents which contained disclosures contrary to the oral promises they had allegedly received. Since this was more than one year before suit was filed and because the limitation periods are not disjunctive, these claims are barred by the one-year statute of limitations. *Anixter, supra.*

Petitioners did not direct the trial court to any portion of the record which would establish a disputed issue of material fact with respect to when Petitioners did or should have discovered any alleged violations of the securities laws. No affidavits or depositions were attached to Petitioners' Response, nor did Petitioners allege any deficiency in the form or substance of the

Motion. By refusing to offer any evidence in opposition to the Motion, Petitioners failed to provide any basis for potential liability against Rio Bravo or Gamble under the securities laws or that they discovered alleged violations of the securities laws prior to the running of limitations. Petitioners failed to respond to the Motion with "specific facts showing that there was a genuine issue for trial." *Celotex*, at 324.

## CONCLUSION

The questions that Petitioners raise are neither special nor significant. The judgment of the District Court and subsequent affirmation by the Fifth Circuit Court of Appeals involves no unsettled questions of law and is entirely consistent with the prior rulings of the Court and other federal circuit courts. Accordingly, the petition should be denied.

Respectfully submitted,

STEPHEN W. SCHUELER
CHARLES M. SILVERMAN
Counsel of Record
MARGRAVES & SCHUELER, P.C.
601 Jefferson, Suite 2200
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(713) 659-4800

*Attorneys for Respondents, Rio Bravo Oil Co., Inc. and Bert Gamble*

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| MICHAEL K. TOPALIAN, ET AL. | § | |
| Plaintiffs, | § | CIVIL ACTION NO. H-87-3826 |
| vs. | § | |
| JOHN N. EHRMAN, ET AL. | § | |
| Defendants. | § | |

## DISCOVERY AND SCHEDULING ORDER

(Entered Mar. 21, 1989)

On January 3, 1989, the Court held a Pretrial Status and Scheduling Conference, which all parties or their attorneys attended, for the purpose of scheduling discovery and disposing of pretrial matters. It is therefore ORDERED:

That the Court's Pretrial and Discovery Order heretofore entered in this cause on June 27, 1988, is amended to the extent provided in this Order.

That only the discovery which is described in, or allowed by, this Order shall be allowed in connection with the above cause.

That the depositions described below shall be scheduled during the hours from 9:30 a.m. through 5:30 p.m. on the dates set forth below, and all counsel are expected to participate in, or attend, the depositions and other discovery ordered herein in accordance with this Schedule which is as follows:

1. January 4, 1989: Review documents produced by the "Ehrman Defendants" at the offices of Frank Pinedo.

2. January 5, 6 and 9, 1989: Oral deposition of Richard Manual at the offices of Frank Pinedo.

3. January 9, 1989: Bobby W. McDonald shall produce the documents ordered herein to be produced by him, at the offices of Frank Pinedo.

4. January 12 and 13, 1989: Continuation of the deposition of Bobby W. McDonald at the offices of Frank Pinedo.

5. January 25, 1989: Oral deposition of Rockwood Insurance Company at the offices of Butler & Binion.

6. February 1 and 2, 1989: Oral deposition of Frank Leggio at the offices of Butler & Binion. Plaintiff's counsel is hereby ORDERED to have a subpoena issued and served upon Frank Leggio compelling his appearance at the time and place ordered herein, which subpoena shall be accompanied by a copy of this Discovery and Scheduling Order.

7. February 8 and 9, 1989: Defendant Joel Middlebrook is hereby ordered to appear for the taking of her oral deposition at the offices of Butler & Binion at 1600 Allied Bank Plaza, Houston, Texas 77002 commencing at 9:30 a.m. on February 8, 1989 and continuing until 5:30 p.m. and commencing at 9:30 a.m. on February 9, 1989 and continuing until 5:30 p.m. or until completion of the deposition. Plaintiff's counsel is ORDERED to serve a copy of this Order

upon Defendant Joel Middlebrook by certified mail and by regular mail at her address at 2927 Drexel, Houston, Texas 77027, and proof of mailing of such notice by Plaintiff's counsel shall constitute service of notice of this order, the court observing that Joel Middlebrook appeared in open court on January 3, 1989 and received, verbally, the orders reduced to writing herein.

8. February 21 and 22, 1989: Oral deposition of Victor B. Russek to be held at the offices of Margraves, Kennerly & Schueler.

9. March 1, 1989: Oral deposition of Roy Jacobs at the offices of Margraves, Kennerly & Schueler.

10. March 2, 1989: Oral deposition of Michael K. Topalian at the offices of Margraves, Kennerly & Schueler.

11. March 8, 1989: Oral depositions of Warren B. Fienga commencing at 9:30 a.m. and Richard D. Mikels commencing at 1:30 p.m., each at the offices of Butler & Binion.

12. March 9, 1989: Oral depositions of Jean Steubing commencing at 9:30 a.m. and Jack E. Burroughs commencing at 1:30 p.m., each at the offices of Butler & Binion.

13. March 10, 1989: Oral depositions of Don Boyette commencing at 9:30 a.m. and MJM Investments and their representative, Mary Bell Lustick, commencing at 1:30 p.m., each at the offices of Butler & Binion.

14. March 14 through 17, 1989, inclusive: Oral deposition of John Ehrman at the offices of Frank Pinedo.

15. March 21 and 22, 1989: Oral deposition of Richard O'Donnell at the offices of Vinson & Elkins.

16. March 30, 1989: Oral deposition of Wayne M. Byles at the offices of Butler & Binion.

17. March 31, 1989: Oral deposition of Juan Garcia-Quiroga commencing at 9:30 a.m. at the offices of Butler & Binion.

18. March 31, 1989, Afternoon: Reserved for any additional deposition to be designated by any Defendant.

19. April 6, 1989: Oral deposition of Gideon Chern, as a representative of Inter-Discount Limited, at an address in Manhattan, New York City, New York to be designated by Plaintiff's counsel within ten (10) days of the date of this Order. Plaintiff's counsel is ORDERED to cause a subpoena for the witness to be issued and served upon him and to certify to all counsel of record, in writing, that such subpoena has been issued and served upon such witness not later than March 15, 1989. If such subpoena is not served, or if such certificate of such service is not issued, this deposition shall be cancelled.

20. April 13, 1989: Oral deposition of Robert Eckis, who is hereby ordered to appear at the offices of Campbell & Morris in Houston, Texas for the taking of his deposition; provided, however, that Plaintiff's counsel shall pay, or reimburse Defendant

Robert Eckis for his air fare, hotel accommodations and other reasonable and necessary expenses incurred by him to travel to Houston for the taking of his deposition; provided, further, that to the extent other parties participate in the deposition of Mr. Eckis, by asking questions, they shall bear a pro-rata portion of the travel expenses of Mr. Eckis; provided further that the entry of this Order, or the appearance of Robert Eckis for deposition pursuant hereto, shall be without prejudice to the Motion to Dismiss heretofore filed on behalf of Robert Eckis, and shall not constitute a waiver thereof.

21. April 20 and 21, 1989: Plaintiff shall take the oral depositions of the expert witnesses designated by Defendants Rio Bravo Oil Company, Bert Gamble, Houston Petroleum Company and Richard O'Donnell, at the offices of Vinson & Elkins.

22. April 26, 1989: Defendants shall take the deposition of any expert designated by Plaintiff. In this connection, the Court notes that (i) the time for Plaintiff to designate expert witnesses, under the Court's prior scheduling order, has passed, (ii) Plaintiff has designated no experts, (iii) Defendants object to any designation of experts by Plaintiff, and (iv) neither this Order, nor attendance at or participation in the taking of such deposition, shall constitute a waiver of any such objection. Any objection by Defendants to the designation of such experts by Plaintiff shall be considered separately by the Court.

23. April 27, 1989: Oral deposition of John McIntyre commencing at 9:30 a.m. at the offices of Frank Pinedo. Plaintiff's counsel is Ordered to cause a subpoena for the witness to be issued and served upon him and to certify to all counsel of record, in writing, that such subpoena has been issued and served upon such witness. If such subpoena is not served, or if such certificate of such services is not issued, this deposition shall be cancelled.

24. April 28, 1989: Reserved for the taking of any other depositions in this case which may be designated by any party.

That any Interrogatories or Requests for Production of Documents to be served by any party shall be served on or before January 31, 1989.

That with respect to Requests for Admissions:

1. No more than thirty (30) requests for admissions may be served upon any Defendant except pro se Defendants in which case no such limitation shall apply.

2. All Requests for Admissions of parties whose depositions have been completed shall be served on or before January 31, 1989.

3. Requests for Admissions for any other party shall be served within ten (10) days after the completion of such party's deposition.

That each Plaintiff is specifically ORDERED, prior to appearing for the deposition of such Plaintiff, to:

1. Review and familiarize themselves with all documents which were received, reviewed

or signed by any such Plaintiff, or relied on by any such Plaintiff, or which any such Plaintiff claims contains any misrepresentations or omissions.

2. To the extent that Plaintiffs may have produced copies of such documents previously, each Plaintiff is ordered to go to the offices of Plaintiff's counsel, or such other place as may be necessary to obtain and review a copy of all documents required to be produced by this Order.

3. Produce, at the time and place of the taking of such Plaintiff's deposition, all documents which were received, reviewed or signed by such Plaintiff, or relied on by such Plaintiff, or which such Plaintiff claims contain any misrepresentations or omissions, together with any other documents which have been requested to be produced by any of the Defendants, in a Request for Production of Documents or in a Deposition Notice.

That Plaintiffs admit that Plaintiff Roy Jacobs is an "accredited investor" and, by January 9, 1989, Plaintiff's counsel shall designate, in writing, any other Plaintiffs which admit that they are "accredited investors".

That Plaintiff Bobby W. McDonald is hereby specifically ORDERED to produce, at 10:00 o'clock a.m. on January 9, 1989, at the offices of Frank Pinedo, all of the following:

1. All financial and accounting records maintained by, or on behalf of, Plaintiff Bobby W. McDonald for (i) all Plaintiffs (other than Roy Jacobs and any other Plaintiff which Plaintiff's counsel certifies as an accredited

investor), (ii) all persons or entities who invested, sent funds to or at any time owned an interest in On-Shore Exploration Limited 1984 Mid-Year Drilling Program ("On-Shore"), and (iii) any of the Defendants herein.

2. All calendars and notes of meetings, transactions and conversations maintained by or on behalf of Plaintiff Bobby W. McDonald.

3. All police reports referred to in the deposition of Plaintiff Bobby W. McDonald.

4. All other documents requested to be produced during the deposition of Plaintiff Bobby W. McDonald on December 29, 1988.

That all accountant/client privileges asserted by Plaintiff Bobby W. McDonald does not exist, and it shall not be asserted by Plaintiff Bobby W. McDonald.

That all depositions shall be transcribed, in writing, by a stenographer or court reporter, but any party may videotape any deposition ordered herein, which videotape, if offered in evidence, must comply with the requirements for admission into evidence of a videotaped deposition.

That any request for a protective order with respect to non-parties or their representatives attending depositions ordered in this case is denied.

That the deadline for completion of discovery shall be April 30, 1989.

That the deadline for filing Motions shall be June 15, 1989; provided that, for any Motion filed by any party

between June 1, 1989 and June 15, 1989, the response and submission date shall be July 10, 1989.

That, by August 1, 1989, Plaintiff's counsel shall furnish to all Defendants' counsel, including pro se Defendants, a proposed Joint PreTrial Order, in compliance with the requirements of this Court, and the Local Rules and Federal Rules of Procedure.

That the Final Joint PreTrial Order shall be filed by August 21, 1989.

That this case shall be set for docket call on August 28, 1989 at 9:30 o'clock a.m.

That the week of July 24, 1989, shall be reserved for a further Status Conference or Final PreTrial Conference, or for the hearing and disposition of Motions pending at that time. Such Status and PreTrial Conference shall be held on July 28 at 9:30 o'clock a.m. or such date and time as the Court may later designate.

SIGNED at Houston, Texas this 20th day of March, 1989.

/s/ Norman Black
PRESIDING JUDGE

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| MICHAEL K. TOPALIAN, ET AL<br><br>Plaintiffs,<br><br>VS.<br><br>JOHN N. EHRMAN, ET AL<br><br>Defendants. | §<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§ | CIVIL ACTION NO. H-87-3826<br><br>(Filed June 15, 1989) |

DEFENDANTS RIO BRAVO OIL COMPANY AND BERT GAMBLE'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

Defendants Bert Gamble ("Gamble"), individually and in his capacity as President of Rio Bravo Oil Company, and Rio Bravo Oil Company ("Rio Bravo") move this Court as follows:

1. That this Court should dismiss Plaintiffs' First Amended Complaint (the "Complaint") as to these Defendants because the Complaint does not state a claim upon which relief can be granted, or in the alternative, this Court enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in favor of Gamble and Rio Bravo on the ground that there is no genuine issue as to any material fact and that Gamble and Rio Bravo are entitled to judgment as a matter of law.

2. A memorandum in support of this motion to dismiss or, in the alternative, motion for summary judgment is filed concurrently with this motion.

3. This Motion is supported by the affidavit of Gamble, attached hereto as Exhibit No. 1.

4. This Motion is further supported by excerpts from the following depositions:

a. Bert Gamble;

b. Jack Burroughs;

c. Marybelle Lustick;

d. Juan Garcia-Quiroga;

e. Michael Topalian;

f. Richard Manuel; and

g. Jean Steubing.

(references to these depositions in the Memorandum shall be by deponent, page [p.], and line [l.]).

5. This Court indicated after Rio Bravo and Gamble filed their Motion to Dismiss during the early stages of this case that they may re-urge their Motion after the parties have had a reasonable time to conduct discovery. The parties have had sufficient time to conduct discovery and at this time Rio Bravo and Gamble are re-urging their Motion to Dismiss, or, in the alternative Motion For Summary Judgment.

6. The filing of the Complaint violates Federal Rule of Civil Procedure 8 because it is not a short and plain statement of the claim, but is instead a vague, repetitive and rambling pleading that does not contain any facts to support its summary allegations against Rio Bravo or Gamble.

7. The Complaint fails to state a cause of action under state securities law or, in the alternative there is not genuine issue of any material fact and Rio Bravo and Gamble are entitled to judgment as a matter of law.

8. The Complaint fails to plead a cause of action for common law fraud, or in the alternative there is no genuine issue as to any material fact and Rio Bravo and Gamble are entitled to judgment as a matter of law.

9. The Complaint fails to state a cause of action under Section 17(a) of the Securities Act of 1933.

10. The Complaint fails to state a cause of action under Section 10(b) of the Securities and Exchange Act of 1934 and Rule 10b-5 promulgated thereunder or, in the alternative there is no genuine issue as to any material fact and Rio Bravo and Gamble are entitled to judgment as a matter of law.

11. The Complaint fails to state a claim under Section 12(2) of the Securities Act of 1933 or, in the alternative there is no genuine issue as to any material fact and Rio Bravo and Gamble are entitled to judgment as a matter of law.

12. The Complaint fails to state a claim for relief under 18 U.S.C. §1962 or, in the alternative there is no genuine issue as to any material fact and Rio Bravo and Gamble are entitled to judgment as a matter of law.

13. This Court should decline to exercise pendent jurisdiction over the state law claims asserted by Plaintiffs.

Defendants Rio Bravo and Gamble request that the Court grant this Motion to Dismiss or, in the alternative,

Motion For Summary Judgment and award all other relief to which it is entitled.

Respectfully submitted,

BY: /s/ Stephen W. Schueler
Stephen W. Schueler
Federal I.D. No. 5126
Neil A. Wasserstrom
Federal I.D. No. 6391
2200 Dresser Tower
601 Jefferson
Houston, Texas 77002
713/659-4800

OF COUNSEL:

MARGRAVES, KENNERLY & SCHUELER,
A Professional Corporation
2200 Dresser Tower
601 Jefferson
Houston, Texas 77002-7910

CERTIFICATE OF SERVICE

I, the undersigned attorney, hereby certify that on this the 15th of June, 1989 a true and correct copy of the above and foregoing Defendants Rio Bravo Oil Company and Bert Gamble's Motion To Dismiss Or, In the Alternative, Motion For Summary Judgment was mailed by certified mail, return receipt requested to counsel for Plaintiffs, Armando Lopez, 2990 Richmond, Suite 205, Houston, Texas, 77098 and to all other counsel of record and Pro Se Defendants by first class mail, postage prepaid.

/s/ Stephen W. Schueler
STEPHEN W. SCHUELER

Exhibit No. 1

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| MICHAEL K. TOPALIAN, ET AL | § | |
| | § | |
| Plaintiffs, | § | CIVIL ACTION NO. |
| | § | H-87-3826 |
| VS. | § | |
| JOHN N. EHRMAN, ET AL | § | |
| | § | |
| Defendants. | § | |
| | § | |

AFFIDAVIT OF DEFENDANT BERT GAMBLE IN SUPPORT OF MOTION TO DISMISS OR IN THE ALTERNATIVE MOTION FOR SUMMARY JUDGMENT

| | |
|---|---|
| THE STATE OF TEXAS | § |
| | § |
| COUNTY OF HARRIS | § |

BEFORE ME, the undersigned authority on this day personally appeared BERT GAMBLE, known to me to be the person who, after being duly sworn, upon his oath did depose and state as follows:

> "I am President of Rio Bravo Oil Company ("Rio Bravo"). Neither I nor Rio Bravo had any contact, communication, or involvement with any of the plaintiffs or any other limited partners of Onshore Exploration, Ltd., 1984 Mid-Year Drilling Program ("Onshore") in connection with the offering or sale of limited partnership interests.

"Neither Rio Bravo nor I was involved in the organization, operation, or internal workings of Onshore or in the raising of capital by Onshore or the selling of limited partnership interests in Onshore. Further, neither Rio Bravo nor I have ever acquired, maintained, or owned any interest in Onshore, or in any way established, operated, or controlled Onshore.

"Victor Russek, an independent oil and gas geologist, who Rio Bravo has used on several other occasions to screen and recommend oil and gas prospects and find participants for its drilling programs, brought Onshore to Rio Bravo as a participant in Rio Bravo's drilling programs.

"On or about December 17, 1984, Onshore and Rio Bravo entered into two letter agreements and operating agreements covering drilling on the Southeast Ceuro and Sheriff prospects (the "Prospects"). Copies of the letter agreements and operating agreements are attached to this Affidavit as Exhibit "A-1" and incorporated herein.

"Rio Bravo was the operator on the Prospects, while Onshore was merely one of several passive "non-operator" participants in the Prospects. Each non-operator participant in the Prospects signed the same model form operating agreements that contained essentially the same terms and conditions as the operating agreement signed with Onshore. Each non-operator participant was required to pay its pro rata share of the costs of drilling the wells based on

each participant's respective interest in the Prospects. The costs charged under the letter agreements were normal and customary in the industry.

"At the time Onshore requested to participate in the Prospects, Rio Bravo agreed to Onshore's request to insert a clause in the respective letter agreements providing, that in the event that Onshore was not able to obtain the necessary financing from its lender to pay its proportionate share of the costs necessary for drilling, then Onshore could elect to terminate its participation in the Prospects. Rio Bravo was committed to drill the Prospects with or without Onshore, by its agreement with the other participants who each had paid their pro rata share of the costs of drilling. When Onshore did not elect to withdraw and Onshore paid its pro rata costs of drilling, Rio Bravo assumed that neither Onshore nor any of its partners had any objection to the participation by Onshore in the Prospects. Prior to the institution of this suit, nether Rio Bravo nor I had any notice or knowledge that Onshore or any of its partners had any objection to the participation by Onshore in the Prospects, or regarding the minimum subscriptions required by Onshore or the number of subscriptions received by Onshore. Rio Bravo performed its obligations under the operating agreements as required.

"None of the other non-operator participants, who are unrelated to Rio Bravo and me and the other parties in this action, has complained about its investment in the Prospects.

"It is standard industry practice to engage an independent geologist to screen and recommend

oil and gas prospects and find participants for drilling programs. As mentioned above, Rio Bravo on several occasions has paid Victor Russek for screening and recommending prospects and participants in Rio Bravo's drilling programs. Rio Bravo paid Victor Russek a fee for referring Onshore to its Prospects. Neither Rio Bravo nor I have any knowledge of any relationship or fee arrangement, if any, between Onshore and Victor Russek.

"Prior to the institution of this lawsuit, neither Rio Bravo nor I had any contact with any of the other Defendants in this lawsuit other than the normal business dealings Rio Bravo had with all the non-operator participants in the Prospects.

"All of my acts and communications related to the Prospects or Onshore were made in my representative capacity on behalf of Rio Bravo as its President, and not in my individual capacity."

EXECUTED this 15 day of June, 1989.

/s/ Bert Gamble
BERT GAMBLE,
President,
Rio Bravo Oil Company

SUBSCRIBED and SWORN TO BEFORE ME by the said Bert Gamble in the capacity therein stated, this the 15th day of June, 1989.

/s/ Gwynne L. Diephuis
Notary Public in and for
The State of Texas

My Commission Expires:

November 30, 1992

(seal)
GWYNNE L. DIEPHUIS
NOTARY PUBLIC,
STATE OF TEXAS
MY COMMISSION EXPIRES
NOV. 30, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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| MICHAEL K. TOPALIAN, ET. AL., | § | CIVIL |
| | § | ACTION |
| PLAINTIFFS, | § | NO. H-87-3826 |
| | § | |
| VS. | § | |
| | § | |
| JOHN N. EHRMAN, ET. AL., | § | |
| | § | |
| DEFENDANTS. | § | |

PLAINTIFFS' RESPONSE TO THE RIO BRAVO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

To the Honorable Judge of said Court:

COME NOW **Michael K. Topalian, et al.**, Plaintiffs in the above styled and numbered cause, and file this their response in opposition to the Rio Bravo Defendants' (**Rio Bravo Oil Company, Inc.** and **Bert Gamble**) Motion For Summary Judgment.

The Rio Bravo Defendants' Motion for Summary Judgment is frivolous. It represents a last-ditch effort by these Defendants to avoid a trial of this complex securities fraud and RICO case in which the evidence will clearly show that the Rio Bravo Defendants and others engaged in acts and practices which operated as a fraud or deceit upon Plaintiffs in connection with the sale of securities.

Plaintiffs, in their First Amended Complaint (paragraphs 62-78), raise, in a clear and detailed manner, a number of serious allegations against the Rio Bravo

Defendants. Furthermore, Defendant Gamble's deposition Exhibit No. 27 clearly shows that the Rio Bravo Defendants participated in the solicitation of potential investors. (Plaintiff's Exhibit "A") This exhibit is a brochure together with an agenda for a presentation that was made in solicitation of prospective buyers of Partnership units. The second page of this brochure/agenda lists Defendant Rio Bravo Oil Company and its president, Defendant Bert Gamble, as Participants in this "seminar". Defendant Bert Gamble addressed the potential investors with regard to the type of prospects that were to be drilled on behalf of the Partnership.

Plaintiffs contend, among other things, that the solicitations by the Rio Bravo Defendants of potential investors in a general, "seminar" style gathering is a violation of Rule 502(c) of Regulation D, Promulgated, pursuant to the Securities Act of 1933. Moreover, the Rio Bravo Defendants knew that they would benefit financially from the sales of the securities units. *See Dahl v. Pinter*, 56 U.S.L.W. 4579, 4588 (1988). Accordingly, the Rio Bravo Defendants are liable under Sections 12(1) and 12(2) of the 1933 Securities Acts, in addition to their violations of Rule 10b-5 and the RICO statute.

Plaintiffs, at a minimum, can clearly establish that the Rio Bravo Defendants aided and abetted the securities violations alleged in the Complaint. In this regard, Plaintiffs contend that this evidence (Plaintiffs' Exhibit "A") shows that these Defendants had more than just a "general awareness" of their role in the Rule 10b-5 violations and that they knowingly rendered "substantial assistance" in the violations. *See Abell v. Potomac Insurance Co.*, 858 F.2d 1104, 1126 (5th Cir. 1988). Additionally, like

the Houston Petroleum and Kelley Onshore Defendants, the Rio Bravo Defendants disregarded the terms and conditions of the Offering Memorandum and commenced drilling operations before Onshore was funded.

Plaintiffs' claims under the RICO statute are equally strong in view of prevailing precedent. *See generally, H. J., Inc. v. Northwestern Bell Telephone Co.*, 57 U.S.L.W. 4951 (U.S. June 27, 1989), *reversing and remanding* 829 F.2d 648 (8th Cir. 1987); *Sedima, S.P.R.L. v. Imrex Company, Inc.*, 473 U.S. 479 (1985); *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350 (5th. Cir. 1985), *cited in H. J., Inc. v. Northwestern Bell Telephone Co., supra*, 57 U.S.L.W. at 4952 note 2.

Accordingly, the Rio Bravo Defendants' contention that there is no genuine issue as to any material fact is on its face preposterous, especially given the complex facts of this case. If ever there was a case that was inappropriate for summary judgement [sic], this is it. The Rio Bravo Defendants' Motion for Summary Judgement [sic] is clearly part of a large effort of certain Defendants to avoid their day of reckoning by unnecessarily burdening Plaintiffs' counsel with paperwork. These Defendants' only hope at this point is that this Court will dismiss them from this lawsuit on any grounds possible so long as the ruling takes place prior to a trial on the merits. What Defendants want is a trial by deposition and affidavits; they fear the testimony that will be presented at trial which establishes their culpability. However, on this record, Plaintiffs are entitled to have this Court resolve the multitude of issues involving these Defendants in a trial on the merits.

1. **THE SECURITIES VIOLATIONS**. The Rio Bravo Defendants are apparently asserting that they had no duty to disclose anything to the investors because they lacked a fiduciary or other similar relationship of trust and confidence vis-a-vis the investors. They also implicitly deny any liability for aiding and abetting securities laws violations, among other things.

The Rio Bravo Defendants' contentions are without merit. Plaintiffs contend that the evidence will establish these Defendants' culpability in the scheme to defraud the Plaintiffs under Rule 10b-5. As the Fifth Circuit has noted, coverage under Rule 10b-5 is not a limited one. *Hilgeman v. National Ins. Co. of America*, 547 F.2d 298, 302 (5th Cir. 1977). The Rule, among other things, prohibits any person from engaging in "any act, practice or course of business which operates or would operate as a fraud or deceit upon any person." *Hilgeman, supra*, Section 240.10b-5.

Plaintiffs possess evidence which will establish that Defendants were participants in a scheme to enrich themselves and others at the expense of the Plaintiffs-investors. Plaintiffs will also be able to establish that the Rio Bravo Defendants knowingly rendered substantial assistance to others who violated Rule 10b-5.

Plaintiffs assert that the Rio Bravo Defendants engaged in acts which operated as a fraud upon the Plaintiffs in connection with the selling of securities. At the trial on the merits, Plaintiffs will be able to clearly show that they suffered an injury as a result of deceptive practices "touching" the sale of securities to them within the meaning of Section 10b of the 1934 Securities

Exchange Act. *Cf. Superintendent of Insurance v. Bankers Life & Casualty Co.*, 404 U.S. 6, 10-13 (1971).

Accordingly, Plaintiffs must be given the opportunity to prove that the Rio Bravo Defendants not only aided and abetted violations of the securities laws but engaged in acts and business practices which operated as a fraud or deceit upon Plaintiffs in connection with their purchases of securities.

The Rio Bravo Defendants' implied assertion that they had no duty to disclose anything to the investors is without merit. As the Supreme Court stated in *Dirks v. SEC*, 463 U.S. 646, 655 n. 14 (1983), under certain circumstances even outsiders may become fiduciaries of investors where confidential information is legitimately revealed to an underwriter, accountant, lawyer, consultant or other persons solely for business purposes. That certainly, at a minimum, is the case here since Rio Bravo Oil Company was a joint-venturer in the project. Furthermore, it is also clear that one who missappropriates [sic] material information to his own advantage violates Section 10(b) and Rule 10b-5. *Cf. SEC v. Materia*, 745 F.2d 197, 203 (2d Cir. 1984); *Carpenter v. United States*, 791 F.2d 1024, 1027-1034 (2d Cir. 1986), *aff'd by an equally divided court on the 10(b) issue*, ___ U.S. ___ 108 S.Ct. 316, 320 (1987). Congress has now made clear that liability is not dependant [sic] on a fiduciary relationship but applies to *any person* buying or selling while in possession of material undisclosed information and any persons communicating this information to others. *See "Insider Trading and Securities Fraud Enforcement Act of 1988"*, Sections 20A (a)(b)(c)(d) as amended, Pub. Law 100-704, 102 Stat. 4677 (November 11, 1988).

There is no doubt that the Rio Bravo Defendants were privy to, and benefited from, material, undisclosed information. Such information was bought from Defendant Russek, Onshore's geologist, to whom Rio Bravo paid at least FIFTEEN THOUSAND ($15,000.00) DOLLARS for the Onshore referral. This admission was made by Defendant Bert Gamble during deposition testimony on December 20, 1988.

Accordingly, it is clear that there are many contested issues to be resolved with respect to the Rio Bravo Defendants' liability under Rule 10b-5.

Similarly, there are numerous fact questions to be resolved concerning the Rio Bravo Defendants' liability under sections 12(1) and 12(2) of the 1933 Securities Act. As mentioned earlier, there is evidence that the Rio Bravo Defendants were active participants in the solicitation of potential investors. Certainly, the Rio Bravo Defendants were motivated, at least in part, by a desire to serve their own financial interests. Accordingly, there are genuine issues of fact concerning the Rio Bravo Defendants' liability under the 1933 Securities Acxt [sic]. *See generally, Pinter v. Dahl*, 56 U.S.L.W. 4579, 4588 (1988).

2. **RICO VIOLATIONS**. The Rio Bravo Defendants' argument that Plaintiffs have failed to make out a RICO case against them is equally without merit. These arguments are particularly inappropriate here. Plaintiffs have gone to great lengths to plead this case with clarity and specificty [sic]. What Defendants are really requesting is that Plaintiffs prove their case in their Complaint.

Moreover, Defendants' memorandum conveniently omits any discussion of controlling cases that undermine

their arguments. *See H. J., Inc. v. Northwestern Bell Telephone Co.*, 57 U.S.L.W. 4951 (U.S. June 27, 1989), *reversing and remanding* 829 F.2d 648 (8th Cir. 1987); *R.A.G.S. Couture. Inc. v. Hyatt*, 774 F.2d 1350 (5th Cir. 1985).

Throughout the text of their Complaint, Plaintiffs clearly detail that they were fraudulently induced to make sizeable [sic] investments of money in an "Enterprise" which was conceived, developed and operated for the unjust enrichment of the Defendants. The "Enterprises" referred to are clearly the limited partnerships – Onshore Exploration Ltd., 1984 Mid-Year Drilling Program in one instance, and Texas Energy Ltd., in the other. Thus, it is plain to see that Plaintiffs are not referring to Ehrman Investment Group, Inc., or any of the other Defendants as the "Enterprise."

Plaintiffs do contend, however, that Defendants Ehrman and Ehrman Investment Group, Inc. and the Rio Bravo Defendants, *inter alia*, conducted or participated, directly or indirectly, in the limited partnership – the Enterprise – through a pattern of racketeering activity in violation of 18 U.S.C. 1962 (c). Plaintiffs will show at trial how the various Defendants constituted an association of organizations that regularly engaged in the practice of selling and financing investments in oil and gas limited partnerships through fraud, omissions of material facts and other unlawful acts.

To require Plaintiffs to conclusively prove these matters prior to trial is not required. However, Plaintiffs contend that they will be able to prove their case if given the opportunity.

Defendants' contention that Plaintiffs will not be able to show a pattern of racketeering activity is similarly without merit. In *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350, 1354 (5th Cir. 1985), the Fifth Circuit read the "pattern and other requirements of the RICO Act broadly. The Court noted that the mailing of two (2) invoices alleged by plaintiff to be fraudulent was sufficient to constitude [sic] a pattern of racketeering activities". *R.A.G.S. Couture, Inc. v. Hyatt, supra*, 774 F.2d at 1354. The Supreme Court recently cited this case and holding in its most recent decision on RICO. *See H. J., Inc., v. Northwestern Bell Telephone Co.*, 57 U.S.L.W. 4951, 4952, n. 2 (1989).

In this case, Plaintiffs have alleged financial injuries as a result of various predicate acts, including violations of Section 10(b) and federal mail and wire fraud statutes. These allegatiions [sic] are sufficient to withstand a motion to dismiss. *Corwin v. Marney Orton Investments*, 788 F.2d 1063, 1069 (5th Cir. 1986). Moreover, Plaintiffs will be able to show "acts (on the part of Defendants) that have the same or similar purposes, results, participants, victims, or methods of commission," and that are otherwise "interrelated by distinguishing characteristics." *Sedima, S.P.R.L v. Imrex Company, Inc.*, 473 U.S. 479, 496 at note 14 (1985). *Accord: H. J. Inc. v. Northwestern Bell Telephone Co.*, 57 U.S.L.W. 4951, 4953 (1989). Accordingly, Plaintiffs believe that they have a strong case against Defendants.

As the Fifth Circuit stated in *R.A.G.S Couture, Inc. v. Hyatt, supra*, 774 F.2d at 1355:

> "The scope of the civil RICO statute is breathtaking. An allegation of fraud in a contract action can transform an ordinary state claim into

> a federal racketeering charge. It may be unfortunate [sic] for federal courts to be burdened by this kind of case, but it is not for this court to question policies decided by Congress and upheld by the Supreme Court." *Id.*

Plaintiffs contend that they will be able to prove their RICO allegations at the trial of this case under any of the standards referred to by Defendants in their memorandum. The acts of the Defendants in this case which were perpetrated against the Plaintiffs were the result of their participation, directly or indirectly, in the affairs of the Parternship [sic] through a pattern of racketeering activity. Plaintiffs are entitled to their day in court in order to prove their case.

## CONCLUSION

This difficult and complex case is clearly inappropriate for summary judgement [sic]. This is especially true for these Defendants since Plaintiffs are still in the process of taking deposition testimony of other Defendants, and have yet to depose one of the central figures in the "scheme", Defendant John N. Ehrman. The granting of summary judgment without the benefit of Ehrman's testimony, which is crucial to this case, would surely result in a miscarriage of justice for all concerned, especially Plaintiffs.

Factual issues abound with respect to every issue in this case. Congress has given this Court jurisdiction over defendants such as the Rio Bravo Defendants and empowered this Court to award appropriate relief. Plaintiffs will be able to clearly establish at trial that the Rio

Bravo Defendants have played an important and substantial role in an intricate scheme to mislead and defraud investors for the personal gain of the Defendants. Plaintiffs are entitled to their day in court. Accordingly, Plaintiffs respectfully pray that the Rio Bravo Defendants' Motion for Summary Judgment be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Armando Lopez, hereby certify that a true and correct copy of the foregoing instrument has been hand delivered to the Rio Bravo Defendants, by and through their attorney of record, Mr. Neil Wasserstrom, MARGRAVES, KENNERLY & SCHUELER, 2200 Dresser Tower, 601 Jefferson, Houston, Texas 77002, and by U.S. First Class Mail to all other counsel of record and pro-se parties on this the 27th day of July, 1989.

/s/ Armando Lopez
Armando Lopez

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| MICHAEL TOPALIAN, ET AL, PLAINTIFFS, | § | CIVIL ACTION |
| vs. | § | NO. H-87-3826 |
| JOHN N. EHRMAN, ET AL, DEFENDANTS. | § | (Filed Aug. 7, 1989) |

REPLY OF DEFENDANTS RIO BRAVO OIL COMPANY AND BERT GAMBLE TO PLAINTIFFS' RESPONSE TO THE RIO BRAVO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants Bert Gamble, individually and in his capacity as President of Rio Bravo Oil Company ("Gamble"), and Rio Bravo Oil Company ("Rio Bravo") respectfully file this Reply to Plaintiffs' Response to the Rio Bravo Defendants' Motion for Summary Judgment.

## Introduction

On June 15, 1989, Defendants Gamble and Rio Bravo moved this Court to dismiss Plaintiffs' First Amended Complaint (the "Complaint") as to these Defendants for failure to state a claim upon which relief can be granted, and alternatively moved this Court to grant a summary judgment in favor of Defendants Gamble and Rio Bravo on the ground that there is no genuine issue as to any material fact and that Gamble and Rio Bravo are entitled to judgment as a matter of law. Gamble and Rio Bravo also filed an affidavit, excerpts from depositions, and a memorandum in support of this motion (the "Motion").

On July 28, 1989, Plaintiffs filed their Response to the Rio Bravo Defendants' Motion for Summary Judgment (the "Response"). The Response, with its vague, unsupported, and irrelevant statements of counsel, further serves to indicate that dismissal of the claims against Gamble and Rio Bravo or summary judgment in favor of Gamble and Rio Bravo is appropriate. Plaintiffs failed to address many of the points made in the Motion and supporting memorandum, and the arguments that Plaintiffs did make are cursory and conclusory. Plaintiffs have failed to state any claim upon which relief can be granted against Gamble or Rio Bravo, and in their Response Plaintiffs have not cured this fatal defect nor have they provided any of the necessary support required to defeat the motion of Gamble and Rio Bravo for summary judgment.

## Standards for Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against the party who fails to make a sufficient showing to establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 106 S.Ct. 2548, 2552-3 (1986). Further, "Rule 56(e) therefore requires the non-moving party to go beyond the pleadings and by her own affidavits, or by the 'definitions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.' " *Id.* at 2553. Rule 56 requires "that a Plaintiff adduce evidence, not merely

argument, in response to a Defendant's properly supported motion for summary judgment." *Foval v. First National Bank of Commerce in New Orleans*, 841 F.2d. 126, 129 (5th Cir. 1988); *Fontenot v. Upjohn Co.*, 780 F.2d. 1190, 1195 (5th Cir. 1986).

"On a motion for summary judgment, the opponent bears the burden of establishing that there are genuine issues of material fact, and may not wait until trial or appeal to develop claims or defenses in response to the summary judgment motion." *C.F. Dahlberg & Co., Inc. v. Chevron U.S.A., Inc.*, 836 F.2d. 915, 920 (5th Cir. 1988); *Golden Oil Co. v. Exxon Co., U.S.A*, 543 F.2d. 548, 551 (5th Cir. 1976). "The nonmovant may not simply rely on vague assertions that additional discovery will produce needed, but unspecified, facts, particularly where, as here, ample time and opportunities for discovery have already lapsed." *Union City Barge Line, Inc. v. Union Carbide Corp.*, 823 F.2d. 129, 137 (5th Cir. 1987), *S.E.C. v. Spence & Green Chemical Co.*, 612 F.2d. 896, 901 (5th Cir. 1980).

Plaintiffs Have Failed to Provide the Support Required to Defeat the Motion for Summary Judgment

Plaintiffs have failed to go beyond their vague pleadings and offer specific facts showing that there is a genuine issue for trial. Plaintiffs are unable even to produce an affidavit of any of the Plaintiffs in support of their claims against Gamble and Rio Bravo presumably, as indicated by the excerpts from the depositions of the Plaintiffs attached to the Motion, because no Plaintiff has any knowledge of any facts supporting any claim against Gamble or Rio Bravo.

Plaintiffs have chosen to ignore their burden under Rule 56 to introduce evidence to demonstrate the existence of a fact issue, and have instead elected (presumably because they have no other choice as no such evidence exists) to attempt to wait until a trial to produce any evidence in support of their claims. The Response is replete with phrases such as "Plaintiffs contend that the evidence will establish" (page 4), "Plaintiffs possess evidence which will establish" (page 4), "At the trial on the merits, Plaintiffs will be able to clearly show" (page 5), "Plaintiffs will show at trial" (page 8), "Plaintiffs contend that they will be able to prove their case" (page 8), and "Plaintiffs contend that they will be able to prove" (page 9). However, the Response is devoid of any actual evidence necessary to defeat the motion of Gamble and Rio Bravo for summary judgment. "At some point in every case, plaintiff must lay down the shield of non-specific 'possibilities' and come forth with specific facts which, if proved, will actually establish liability on the part of the defendant. For these plaintiffs, that time is now. They have failed to do so after having been granted every reasonable opportunity." *McLemore v. Landry*, 668 F.2d. 531 (M.D.La. 1987). As in *McLemore*, this Court should "now slam the door on the civil RICO claims" and other claims of the Plaintiffs against Gamble and Rio Bravo.

The only evidence to which Plaintiffs even attempt to make reference are a brochure attached as an exhibit to Gamble's deposition and then later Gamble's deposition itself. The exhibit, Exhibit "27" to Gamble's deposition and attached to this Reply as Exhibit "A", makes no reference at all to Onshore Exploration, Ltd., 1984 Mid-

Year Drilling Program ("Onshore"), the limited partnership involved in this case, and on its face relates only to Texas Energy Limited (TEL). Plaintiffs have previously attempted to amend their pleadings to add claims regarding this same partnership, and the Court has on three occasions refused to permit such amendment. This exhibit is no evidence at all regarding Plaintiffs' claims relating to Onshore.

Plaintiffs also refer to deposition testimony given by Gamble on December 20, 1988, as containing some sort of an admission that Gamble or Rio Bravo benefited from material, undisclosed information and that such information was purchased from Defendant Victor Russek. Plaintiffs do not give the Court the courtesy of citing any particular page or line of this 226 page deposition upon which they are relying. However, upon extensive review of the deposition of Gamble, it appears that approximately 36 pages refer to Victor Russek. These pages are attached as Exhibit "B" to this Reply. Of these pages, only approximately 8 pages refer in any way to any payments made to Mr. Russek. These pages, pages 190-4, 196-7, and 206, are attached hereto as Exhibit "C". As is apparent from these excerpts, the deposition of Gamble does not in any way contain any admission that Rio Bravo or Gamble "were privy to and benefited from, material, undisclosed information" or that "such information was bought from Defendant Russek, Onshore's geologist, to whom Rio Bravo paid at least $15,000 for the Onshore referral", as Plaintiffs attempt to indicate in the Response. The deposition testimony of Gamble indicates merely that Rio Bravo paid a commission to Victor Russek for referring Onshore to Rio Bravo as a participant in the drilling prospects of

Rio Bravo. There is no discussion, much less an admission, of any material, undisclosed information that Gamble or Rio Bravo were privy to, benefited from, or purchased from Defendant Russek. These statements in the Response are merely the allegations of Plaintiffs' counsel. They are not a correct report of the contents of the deposition.

## Other Issues

The Response indicates that Plaintiffs are somewhat unsure or unsettled as to the identity of the "enterprise" for purposes of their RICO claims. In their Response to Court's Standing RICO Order, Plaintiffs stated that Onshore was the enterprise. However, in the Response, the Plaintiffs refer to both Onshore and TEL as the enterprises, and also they seem concerned as to whether Ehrmann Investment Group, Inc. may have been construed as the enterprise, as to which Gamble and Rio Bravo had not made any reference whatsoever.

Plaintiffs cite *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d. 1350 (5th Cir. 1985) and *H.J. Inc. v. Northwestern Bell Telephone Company*, ___ U.S. ___, 57 U.S.L.W. 4951 (1987) as supporting Plaintiff and as indicating that two alleged fraudulent acts are sufficient to constitute a pattern of racketeering activities under RICO. Plaintiffs note that *H.J. Inc.* cited *R.A.G.S. Couture, Inc.* However, Plaintiffs failed to note that the Supreme Court cited *R.A.G.S. Couture, Inc.* only in a footnote indicating the conflict of authority among the Courts of Appeal, and effectively overruled *R.A.G.S Couture, Inc.* in stating "[n]or can we agree with those courts that have suggested that a pattern

is established merely by proving two predicate acts. . . ." *H.J. Inc. v. Northwestern Bell Telephone Company*, 57 U.S.L.W. 4951, 4952 (1989). Further, the language quoted on page 8 of the Response purportedly taken from *R.A.G.S. Couture, Inc.* is not in that case.

The Plaintiffs also attempt to raise some red herrings by citing in the Response some cases and a statute relating to insider trading. These cites have no relationship to the issues at hand, as there has been no claim, much less any evidence tending to indicate, that Gamble or Rio Bravo traded in any securities, nor have Plaintiffs produced any evidence tending to indicate that Gamble or Rio Bravo was an insider with respect to Onshore.

## Conclusion

As interpreted by the United States Supreme Court, Rule 56 of the Federal Rules of Civil Procedure mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof at trial. As indicated in the Motion and the memorandum supporting the Motion and in this Reply, Plaintiffs have failed to state a claim upon which relief may be granted and have failed to make a showing sufficient to establish the existence of *any* element essential to their claims. Accordingly, Defendants Rio Bravo Oil Company and Bert Gamble respectfully request that the Complaint be dismissed as against Rio Bravo and Gamble for failure to state a claim upon which relief may granted, or in the

alternative that the Court enter a summary judgment in favor of Rio Bravo and Gamble.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned attorney, hereby certify that on this the ___ day of August, 1989, a true and correct copy of the above and foregoing Reply of Defendants Rio Bravo Oil Company and Bert Gamble to Plaintiffs' Response to the Rio Bravo Defendants' Motion for Summary Judgment was mailed by certified mail, return receipt requested, postage pre-paid, to counsel for Plaintiffs, Armando Lopez, at 2990 Richmond, Suite 205, Houston, Texas 77098, and forwarded to all counsel of

record and pro se Defendants by first class mail, postage pre-paid.

/s/ David M. Washburn
DAVID M. WASHBURN

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 91-1973

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

MICHAEL K. TOPALIAN, WARREN B. FIENGA, ROY JACOBS, JR., RICHARD OROZCO, JUAN GARCIA-QUIROGA, JEAN STUEBING, CHARLES W. ANDERSON, FRANCIS D. COVERT, RICHARD H. MANUEL, JACK E. BURROUGHS, DON W. BOYETT, BOBBY W. McDONALD, CHARLES F. LACELLE, RICHARD D. MIKLES AND MJM VENTURES,

*Petitioners,*

v.

JOHN N. EHRMAN, EHRMAN INVESTMENT GROUP, INC., W. RODERICK JOHNSON, W. RODERICK JOHNSON, P.C., RICHARD O'DONNELL, HOUSTON PETROLEUM CO., INC., JOEL A. MIDDLEBROOK, JOEL A. MIDDLEBROOK, CPA, VICTOR B. RUSSEK, RUSSEK CO., BERT GAMBLE, RIO BRAVO OIL CO., INC., ROCKWOOD INSURANCE CO. AND ROBERT E. ECKIS, JR.

*Respondents.*

**Petition For A Writ of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## BRIEF IN OPPOSITION

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NO. 91-1973

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

MICHAEL K. TOPALIAN, WARREN B. FIENGA, ROY JACOBS, JR., RICHARD OROZCO, JUAN GARCIA-QUIROGA, JEAN STUEBING, CHARLES W. ANDERSON, FRANCIS D. COVERT, RICHARD H. MANUEL, JACK E. BURROUGHS, DON W. BOYETT, BOBBY W. McDONALD, CHARLES F. LACELLE, RICHARD D. MIKLES, AND MJM VENTURES,

*Petitioners,*

v.

JOHN N. EHRMAN, EHRMAN INVESTMENT GROUP, INC., W. RODERICK JOHNSON, W. RODERICK JOHNSON, P.C., RICHARD O'DONNELL, HOUSTON PETROLEUM CO., INC., JOEL A. MIDDLEBROOK, JOEL A. MIDDLEBROOK, CPA, VICTOR B. RUSSEK, RUSSEK CO., BERT GAMBLE, RIO BRAVO OIL CO., INC., ROCKWOOD INSURANCE CO. AND ROBERT E. ECKIS, JR.,

*Respondents.*

**Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit**

## BRIEF IN OPPOSITION OF RESPONDENTS JOHN N. EHRMAN AND EHRMAN INVESTMENT GROUP, INC.

## STATUTES AND REGULATIONS INVOLVED

In addition to those statutes and regulations cited by Petitioners, the following are involved:

Securities Act of 1933, Section 13 (15 U.S.C. 77m)

> *Limitation of Actions*
> **Sec. 13:**
> No action shall be maintained to enforce any liability created under section 11 or section 12(2) unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 12(1), unless brought within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section 11 or section 12(1) more than three years after the security was bona fide offered to the public, or under section 12(2) more than three years after the sale.
>
> [As amended by Act of June 6, 1934, 48 Stat. 908.]

Fed. Rules Civ. Proc. Rule 56(e), 28 U.S.C.A.

> **Rule 56(e):**
>
> **Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred

to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Fed. Rules. Civ. Proc. Rule 56(f), 28 U.S.C.A.

**Rule 56(f):**

**When Affidavits Are Unavailable.** Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

## I. STATEMENT OF THE CASE

### 1. OVERVIEW AND SUMMARY

The Ehrman Respondents do not agree with the "Overview and Summary" of the background of this case as presented by Petitioners. It is, in fact, misleading in several important respects. Petitioners would like the Supreme

Court to believe that Petitioners were arbitrarily denied the opportunity to have the case tried and that the trial court was hasty in ruling on Respondents' Motions for Summary Judgment before discovery in the case was completed. Petitioners filed this lawsuit on December 3, 1987 (R. 1). The trial court entered its first Scheduling Order on June 27, 1988 (R. 58). On January 3, 1989, the Court considered a Joint Motion to Amend the Scheduling Order and subsequently ordered Petitioners' counsel, together with Respondents' counsel, to jointly prepare a Discovery and Scheduling Order to submit to it for its approval which set forth the discovery and pretrial schedule (R. 195 at 60-62). At the January hearing, the Court advised that "the discovery schedule will be the only discovery permitted in the case from this moment forward" and admonished all counsel to participate completely and fully in the discovery (R. 195 at 61-62).

The Discovery and Scheduling Order, which was drafted jointly by Petitioners' counsel and Respondents' counsel and approved by the Court, extended the discovery cut-off to April 30, 1989, thereby extending discovery to a period of approximately seventeen (17) months after the lawsuit had been originally filed (R. 161). The Order set aside thirty-three (33) days out of a four (4) month period for depositions to be held (R. 161). The Order provided that all motions had to be filed by June 15, 1989 and that all responses were due by July 10, 1989 (R. 161). The Order further specified that a Final Pretrial Conference would be held on July 28, 1989 at 9:30 a.m. for "the hearing and disposition of Motions pending at the time" (R. 161 at 7).

Petitioners also try to support their argument that the ruling on the Motions for Summary Judgment was premature by stating, in effect, that they were denied the opportunity to take the deposition of Respondent John Ehrman ("Ehrman"),

characterized as the "Principal Defendant," which deposition Petitioners aver they attempted to take more than six (6) times. The Discovery and Scheduling Order set Ehrman's deposition for March 14 - 17, 1989 (R. 161 at 3). Nevertheless, on March 8, 1989, Petitioners' counsel unilaterally announced that he was postponing Ehrman's deposition to an unspecified time in the future (R. 208 at 4; R. 187 at 5-6). He thereafter noticed it for August 7 - 11, 1989 (R. 191) and later moved up the date to July 24 - 27, 1989 (R. 207), three months after the discovery cut-off and the same week that the final Pretrial Conference was scheduled.

It is also significant to note here that the Discovery and Scheduling Order reserved the week of July 24, 1989 for the hearing and disposition of pending motions (R. 161 at 7). The Order was entered by the Court on March 21, 1989 setting forth July 28, 1989 at 9:30 a.m. specifically for such conference (R. 161 at 7). Petitioners received considerably more than the ten (10) day notice requirement of Rule 56(c), F.R.C.P. cited by Petitioners.

Petitioners also make references to an investigation by the Securities and Exchange Commission which they claim was pending against Respondent Ehrman at the time the instant suit was filed. This was not a matter that was before the trial court and Petitioners efforts to cloud (or taint) the issues in this matter with what happened in another lawsuit filed a year after the judgment in this case is not evidence in this lawsuit and is highly improper. Further, Petitioners make several references to their being victims of a "ponzi scheme." Petitioners did not offer any evidence in the trial court that the actions taken by the Respondent-Defendants were anything more than "normal business practice." (R. 251 at 15).

## 2. THE DISTRICT COURT'S OPINION

The District Court's grant of summary judgment was based on its finding that there were no material fact issues in dispute, including the fact that the claims made were barred by the applicable statutes of limitations. The trial court found, on the basis of the summary judgment evidence submitted by the Defendants (the Petitioners herein), that all but four (4) of the Plaintiffs had purchased their interests on or before November 30, 1984, and that the others (except for one whom the Court found had no standing to bring suit) had purchased their units before May 1, 1985 and that the Plaintiffs did not bring suit to complain of their purchases until after December 3, 1987 (R. 251 at 12 - 13 and 9 - 10). The Court further found that the information furnished to the Plaintiffs concerning their investments and the documents they signed necessary to subscribe to those purchases put them on notice, at least by May 1, 1985, to investigate the alleged misrepresentations and omissions and therefore, their claims under Section 12 of the Securities Act of 1933 (15 U.S.C. 771) and Section 10-b of the Securities Exchange Act of 1934 (15 U.S.C. 78j-5) were time barred under the one year and two year statutes of limitations (R. 251 at 10 - 13).

The trial court further found that the summary judgment evidence offered by the Defendants established that the actions taken by the Defendants were legitimate business practices and that the Plaintiffs failed to present evidence that there were facts in dispute concerning the alleged RICO violations. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986) (R. 251 at 15 - 16).

## 3. THE COURT OF APPEALS' AFFIRMANCE

The Panel of the Fifth Circuit also concluded that Petitioners had completely failed to satisfy their burden in the

trial court of presenting evidence establishing each of the challenged elements of their case for which they would bear the burden of proof at trial. *See Celotex*, 477 U.S. at 322.

## 4. STATEMENT OF BACKGROUND AND FACTS

Respondents do not agree with Petitioners' statement of background and facts. The trial court found the following based on uncontradicted summary judgment evidence presented by the Respondents:

Petitioners were fifteen of seventy-seven investors in a limited partnership called Onshore Exploration Ltd., 1984 Mid-Year Drilling Program ("Onshore"). Petitioners brought suit against twenty-three (23) Defendants seeking damages under Sections 12(1) and 12(2), 15 and 17(a) of the Securities Act of 1933, as amended [15 U.S.C. Sections 771(1) and (2), 77o, and 77q(a)]; Section 10(b) of the Securities Exchange Act of 1934, as amended [15 U.S.C. Section 78(j)] and Rule 10b-5 thereunder [17 C.F.R. Section 240.10b-5]; the Racketeer Influenced and Corrupt Organization Act, the "RICO Act" [18 U.S.C. Section 1964(c)]; the Texas Securities Act [Tex. Rev. Civ. Stat. Ann., art. 581-33]; and for common law fraud and deceit, breach of fiduciary duty and "other conduct alleged to be in violation of the laws of the State of Texas." The litigation was spearheaded by two of the Petitioners who were former employees of one of the limited partnership's general partners, Ehrman Investment Group, Inc. ("EIG"), and who had entered into a dispute with Ehrman and EIG (the "Ehrman Respondents") over back salaries and fees.

Onshore entered into oil and gas drilling agreements with Respondents Houston Petroleum Company ("HPC"), Rio Bravo Oil Company ("Rio Bravo") and Kelly Onshore Drilling Co., Inc. ("Kelly Onshore"). Pursuant to these

agreements, a total of seventeen (17) wells were drilled, ten (10) of which were commercial producers. Several payments of dividends were made to investors before the wells and their production were assigned to Respondent Rockwood Insurance Co. ("Rockwood") to pay for the amount due on notes of investors who had defaulted.

The offering of Units was made primarily to accredited investors pursuant to Rule 506 of Regulation D (17 C.F.R. Section 230.506) promulgated by the Securities and Exchange Commission. Offerings made pursuant to Regulation D and Rule 506 are exempt from the registration requirements of Section 5 of the Securities Act of 1933, as amended (15 U.S.C. Section 77e) and from the registration requirements of the Texas Securities Act (Tex. Rev. Civ. Stat. Ann., art. 581). Regulation D permits the offering to be made to not more than thirty-five (35) non-accredited investors and does not limit the number of offers and sales to accredited investors. (While the Court did not state such a finding in its Order, the offering of Units was not made to more than thirty-five (35) non-accredited investors [T. 240 at 2]).

An investor could subscribe to a Unit by either paying cash or by executing a promissory note for the full payment of his subscription. Sales of the Units were made to a total of seventy-seven (77) investors, including fourteen of the fifteen Petitioners. Six of the Petitioners defaulted in the payment of the promissory notes which they executed in connection with their respective subscription to the Units.

EIG, which guaranteed the payment of the loan made to Onshore by Respondent Interdiscount, Ltd. ("Interdiscount"), was sued by Rockwood as a result of the default by several investors, including six of the Petitioners, in paying the amount due on the promissory notes executed

at the time of their respective subscription to the Units. EIG and Onshore filed a counterclaim in the present action seeking payment of the amount due on said notes from six of the Petitioners.

Onshore began its solicitation of investments in November, 1984 and employed a private placement memorandum (the "Memorandum") dated September 30, 1984. Onshore thereafter updated the Memorandum as of November 30, 1984. Both the Memorandum and its update clearly stated that the investments were speculative investments with a high degree of risk of loss of the entire investment in the partnership. The November 30, 1984 Memorandum stated that the offering termination date was December 31, 1984. In January, 1985, Onshore forwarded a document to each investor who had subscribed on or before December 31, 1984 which permitted each subscriber to rescind his respective purchase of a Unit(s) or to re-affirm the purchase. Any investor who subscribed to a Unit prior to December 31, 1984 and who did not elect to affirm his earlier subscription had his subscription canceled.

In contrast, Petitioners' Statement of Background Facts contains several allegations that are largely unsupported or insignificant. Petitioners allege that "It was public notice that Respondent Ehrman's alleged wrongful conduct ... continued until the SEC obtained permanent injunctive relief in June, 1990..." This statement is not only unsupported, but it is also clearly improper. Petitioners, in preparing a Petition for Writ of Certiorari, are limited to relying on those matters which were before the District Court and that are in the record. The District Court entered its Final Judgment on December 15, 1989. Petitioners' allegations as to what subsequently occurred in June 1990 are therefore clearly improper.

## II. SUMMARY OF THE ARGUMENT

Petitioners' arguments have no real substance. Petitioners' criticism of the Fifth Circuit's holdings show a fundamental misunderstanding of securities law, the methods by which statutes of limitations are interpreted and the applicable standards for Motions for Summary Judgment. Furthermore, the recently enacted Section 27A of the 1934 Securities Exchange Act does not change the outcome of this case.

## III. ARGUMENT

*1. The Fifth Circuit's rulings regarding the trial court's findings and concerning the application of the statute of limitations were proper and in conformity with applicable precedents.*

Petitioners claim that the Fifth Circuit held "that disclaimers in an offering memorandum served to absolutely shield Respondents from all charges of securities fraud regardless of the circumstances" and that "[t]he panel's holding that all Petitioners should have known about Respondents' alleged securities fraud by May 1, 1985" directly conflicts with precedent.

These statements betray a basic misunderstanding by Petitioners of securities law as well as of the Fifth Circuit's holding. Petitioners' argument misses the point: the controlling date for purposes of the running of the respective statutes of limitations for the purposes of this case is when a purchaser of securities knew, or in the exercise of reasonable diligence should have known of the alleged wrong doing. Section 13 of the Securities Act of 1933 (15 U.S.C. 77m); *Corwin v. Marney, Orton Investments*, 788 F.2d 1063, 1066

(5th Cir. 1986); *Wood v. Combustion Engineering, Inc.*, 643 F.2d 339, 341-346 (5th Cir. 1981); *Doran v. Petroleum Management Corporation*, 576 F.2d 91 (5th Cir. 1987).

The District Court's fixing of a date when all Petitioners knew or should have known of the wrongs allegedly committed by the Respondents is not in conflict with the decision in *Azalea Meats, Inc. v. Muscat*, 386 F.2d 5, 9 (5th Cir. 1967) which is distinguishable on the facts; in the instant case there was no showing of the presence of a fiduciary relationship or evidence of fraudulent concealment. In the instant case, the District Court did not decide the factual issues but simply determined that there were no factual issues to be tried. *Azalea*, 386 F.2d at 10.

The Court of Appeals' ruling is entirely consistent with its holding in *Isquith v. Middle South Utilities, Inc.*, 847 F.2d 186 (5th Cir. 1988), *cert. denied*, 488 U.S. 926, 109 S. Ct. 310 (1988). The Court, in *Isquith*, cited by Petitioners, said the standard for determining the adequacy of disclosure is whether the information disclosed would have been misleading on those points about which the information's adequacy is questioned, *to a reasonable investor who read the information as a whole*. *Isquith*, at 207, emphasis ours. In addition, unlike the situation in *Isquith*, in the instant case the Petitioners failed to offer summary judgment evidence to support the allegations in their complaint or to counter Respondents' summary judgment evidence that Petitioners knew or should have known by the exercise of reasonable diligence of the alleged fraud by May 1, 1985. *International Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 936 (1992), cited by petitioners, also holds at p. 1264 that if the record is devoid of evidence necessary to sustain plaintiff's burden of proof (as is the case here), the

defendant, which bears no burden at all, is entitled to judgment in its favor.

2. *The Fifth Circuit acted properly in upholding the District Court's grant of summary judgment.*

Petitioners claim that the Fifth Circuit Panel's application of Summary Judgment standards was improper. The Ehrman Respondents and several of the other Respondents filed their Motions for Summary Judgment (R. 198-202) on June 15, 1989, the deadline set by the District Court's Scheduling Order (R. 161). Responses to such motions pursuant to the Scheduling Order were due by July 10, 1989 (R161). Petitioners did not file their response to the Ehrman Respondents' motion as well as the summary judgment motions of the other Respondents until July 27, 1989 and July 28, 1989 (R. 214 - 218) and for this reason alone, the Court could have deemed these Respondents' motions as being unopposed.

In addition, the summary judgment motion of the Ehrman Respondents directed the District Court's attention to specific deficiencies in the Petitioners' claims and was supported by affidavits and exhibits (R. 199). The response of Petitioners to this motion was not supported by Petitioners' affidavit, was replete with conclusory statements, categorizing the motions of the Ehrman Respondents as "completely lacking in merit" and stating generally that "Factual issues abound with respect to every issue in this case," referred to "volumes of deposition testimony taken to date," and did not address several of the grounds raised in the Ehrman Respondents' Motion for Summary Judgment (R. 214, p. 13). Petitioners responded only to paragraphs 1(a), 1(b), 1(c) and 4 of the Ehrman Respondents' motion. The Ehrman Respondents in replying to Petitioners' response to

their Motion for Summary Judgment, called the District Court's attention to the fact that assuming Petitioners had responded timely to paragraphs 1(a) through 1(c) and paragraph 4 of said Respondents' motion, Petitioners should still be deemed to have acquiesced and consented to the relief requested in other paragraphs of said Respondents' motion (R. 229).

In responding to paragraph 1(b) of the Ehrman Respondents' Motion for Summary Judgment, Petitioners completely failed to furnish any evidence or cite any authorities to rebut the evidence and authorities offered by the Ehrman Defendants concerning the bar of the one-year statute of limitation to Petitioner's claims under Section 12(2) of the Securities Act of 1933. The District Court was justified under these circumstances in finding that the investors were not diligent in bringing their claims under the Securities Act of 1933 into Federal Court (R. 229 pp. 3 and 4).

While Petitioners did not respond to paragraph 1(d) of the Ehrman Respondents' motion discussing the two-year statute of limitations applicable to actions under the Securities Exchange Act of 1934, the same standard of diligence required of investor Plaintiffs under Section 12(2) of the Securities Act of 1933 applies to claims made under the 1934 Act. (R. 229, p. 4) *Swenson v. Engelstad*, 626 F.2d 421 (5th Cir. 1980); *Breen v. Centex Corp.*, 695 F.2d 907 (5th Cir. 1983).

Petitioners completely failed in their response to the Ehrman Respondents' Motion for Summary Judgment to present any evidence or cite any authorities to buttress their RICO claim (R. 199, pp. 4-7; R. 229, p.3; R. 214).

In sum, mere conclusory allegations are not summary judgment evidence. *Pope v. Mississippi Real Estate Commission*, 872 F.2d 127 (5th Cir. 1989); *Semon v. Royal Indemnity Company*, 279 F.2d 737 (5th Cir. 1960).

The Petitioners also claim in their brief that the District Court erred in granting summary judgment to all of the Respondents in view of the recitations of contested issues in the Respondents' Proposed Pre-Trial Order filed with the Court on August 28, 1989. The Petitioners are in error on this point. Upon a proper showing that there is no genuine issue to be tried, a judge may grant a motion for summary judgment wholly irrespective of a pre-trial order specifying a number of issues being contested. *Irving Trust Company, et al. v. United States of America*, 221 F.2d 303 (2nd Cir. 1955), *cert. denied* (1955) 350 U.S. 828, 76 S. Ct. 59, 100 L.Ed. 740. Even where a pre-trial order specifies that certain issues should be tried, the trial judge may subsequently grant a summary judgment on the ground that those issues are not really in dispute. *Securities and Exchange Commission v. Murphy*, 626 F.2d 633 (9th Cir. 1980); Moore, *Federal Practice*, Vol. 6, Part 1, P. 56.02[5] at 56-37 and 56-38 (1990). The function of the summary judgment motion is to sift the proofs pro and con as submitted in the various affidavits and exhibits attached thereto, so that a determination may be made, without the expense and delay of a trial, that there are or are not real, as distinct from mere fictitious or paper issues, which must be disposed of in the traditional manner by trial to the Court or jury. *Irving Trust Company, et al. v. United States of America, supra* at 305.

The Petitioners also argue that the District Court was in error in ignoring the deposition of Respondent Joel A. Middlebrook which Petitioners allege tended to show a solicitation of investors through "dog and pony shows" and

in violation of certain requirements of Rule 502(c) of Regulation D [17 C.F.R. Sec. 230.502(c)] promulgated under the Securities Act of 1933, as amended. Not only did Petitioners fail to mention the deposition of Respondent Middlebrook in their response to the Ehrman Respondents' Motion for Summary Judgment, but even assuming the deposition was part of the evidence considered by the District Court in its ruling, there is nothing in Petitioners' response that refers to any evidence in the deposition or otherwise that would tend to show that the running of the respective statutes of limitations on their claims made under the federal securities acts was tolled. *Corwin v. Marney, Orton Investments*, 788 F.2d 1063, 1066 (5th Cir. 1986); *Wood v. Combustion Engineering, Inc.*, 643 F.2d 339, 341-46 (5th Cir. 1981).

In spite of the usual rule that all doubts are resolved against the moving party, if the movant presents credible evidence that would entitle him to a directed verdict if not controverted at trial, this evidence must be accepted as true on a motion for summary judgment when the party opposing the motion does not offer counter-affidavits or other evidentiary matter supporting his contention that an issue of fact remains, or does not show a good reason, in accordance with Rule 56(f) Fed. R. Civ. P., why he is unable to present facts justifying his opposition to the motion. *Celotex*, 477 U.S. at 322-324, 326. Petitioners, in their brief, misconstrue the impact of *Celotex* on the instant case: Where the Respondents were able to show by the summary judgment evidence the absence of a fact issue, they were entitled to summary judgment when the Petitioners failed to call evidence to the attention of the Court to dispute that contention. Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d*, Vol. 10A, Section 2727 at 31, 1992 Pocket Part. A Court is not required to search the entire record in a case to ensure that the record is "bereft of a

genuine issue of material fact" before a summary judgment can be had. *Nissho-Iwai American Corporation v. Kline*, 845 F.2d 1300, 1307 (5th Cir. 1988). A dispute as to an immaterial fact does not preclude summary judgment. *Church of Scientology of California v. Cazares*, 638 F.2d 1272 (5th Cir. 1981); *Houston North Hospital Properties v. Telco*, 688 F.2d 408 (5th Cir. 1982).

*3. Respondents' Motions for Summary Judgment were timely and proper.*

Petitioners claim that they were "railroad[ed]" by illegitimate and premature motions for summary judgment. In making this claim, Petitioners fail to explain why a motion for summary judgment would be premature when it is made nineteen months after the suit is filed, one and a half months after the close of discovery and only two (2) months before the scheduled docket call. *See Celotex*, 477 U.S. at 326. Furthermore, since the Scheduling Order, agreed to by all counsel, required all motions to be filed by June 15, 1989, Respondents' Motions for Summary Judgment were definitely not premature.

Petitioners seek to cloud the issues by mischaracterizing some subsequent events involving Ehrman and the Securities and Exchange Commission. Since such facts are not properly before the Court (or supported by evidence in the record), Respondents will not comment on Plaintiffs' statements further, other than to say that Petitioners' description of the subsequent events is inaccurate.

*4. The recently enacted Section 27A of the 1934 Securities Exchange Act does not change the outcome of this case.*

Petitioners state that the newly enacted Federal Deposit Insurance Corporation Improvement Act of 1991 may resurrect their claims. Said Act, which added Section 27A of the Securities Exchange Act of 1934 (15 U.S.C. 78 (aa)-1(b)) clearly does not do so. The only actions which are to be resurrected by said new section are the following:

> (b) EFFECT ON DISMISSED CAUSES OF ACTION -- Any private civil action implied under Section 10(b) of this Act that was commenced on or before June 19, 1991:
>
> (1) which was dismissed as time barred subsequent to June 19, 1991; and
>
> (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991,
>
> shall be reinstated on motion by the plaintiff not later than 60 days after the enactment of this section.

Petitioners' claims were dismissed on October 4, 1989.

## CONCLUSION

Petitioners have not only made several misstatements of law and fact in their Petition, but have also failed to show any misapplications of law in the Fifth Circuit's holding, any conflict between the Circuits or any other reasons for the Supreme Court to consider their case. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 91-1973

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

MICHAEL K. TOPALIAN, WARREN B. FIENGA, ROY JACOBS, JR., RICHARD OROZCO, JUAN GARCIA-QUIROGA, JEAN STUEBING, CHARLES W. ANDERSON, FRANCIS D. COVERT, RICHARD H. MANUEL, JACK E. BURROUGHS, DON W. BOYETT, BOBBY W. McDONALD, CHARLES F. LACELLE, RICHARD D. MIKLES AND MJM VENTURES,

*Petitioners,*

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JOHN N. EHRMAN, EHRMAN INVESTMENT GROUP, INC., W. RODERICK JOHNSON, W. RODERICK JOHNSON, P.C., RICHARD O'DONNELL, HOUSTON PETROLEUM CO., INC., JOEL A. MIDDLEBROOK, JOEL A. MIDDLEBROOK, CPA, VICTOR B. RUSSEK, RUSSEK CO., BERT GAMBLE, RIO BRAVO OIL CO., INC., ROCKWOOD INSURANCE CO. AND ROBERT E. ECKIS, JR.

*Respondents.*

**Petition For A Writ of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## HOUSTON PETROLEUM CO., INC. AND RICHARD O'DONNELL'S ("RESPONDENTS") BRIEF IN OPPOSITION

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## QUESTION PRESENTED

1. Whether the District Court's granting of summary judgment in favor of Houston Petroleum Company and Richard O'Donnell, and the Fifth Circuit Court of Appeals' affirmation of that decision, was proper when Petitioners failed to present any competent evidence or specific facts tending to establish a genuine issue for trial.

## INTERESTED PARTIES

### PETITIONERS

MICHAEL K. TOPALIAN, WARREN B. FIENGA, ROY JACOBS, JR., JUAN GARCIA-QUIROGA, RICHARD OROZCO, JEAN STEUBING, CHARLES W. ANDERSON, FRANCIS COVERT, RICHARD H. MANUEL, BOBBY W. McDONALD, JACK E. BURROUGHS, DON W. BOYETT, CHARLES F. LaCELLE, RICHARD MIKLES, and MJM VENTURES

### RESPONDENTS

JOHN N. EHRMAN, Individually and In His Representative Capacity As President of EHRMAN INVESTMENT GROUP, INC., EHRMAN INVESTMENT GROUP, INC., W. RODERICK JOHNSON, W. RODERICK JOHNSON, P.C., RICHARD O'DONNELL, Individually and In His Representative Capacity As President of HOUSTON PETROLEUM CO., INC., HOUSTON PETROLEUM COMPANY, INC., JOEL A. MIDDLEBROOK, JOEL A. MIDDLEBROOK, C.P.A., VICTOR B. RUSSEK, RUSSEK CO., BERT GAMBLE, Individually and In His Representative Capacity As President of RIO BRAVO OIL COMPANY, INC., RIO BRAVO OIL COMPANY, INC., LAWRENCE KELLEY, JR., Individually And In His Representative Capacity As President of KELLY ONSHORE DRILLING CO., INC., KELLEY ONSHORE DRILLING CO., INC., ROCKWOOD INSURANCE COMPANY and ROBERT E. ECKIS, JR.

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NO. 91-1973

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

MICHAEL K. TOPALIAN, WARREN B. FIENGA, ROY JACOBS, JR., JUAN GARCIA-QUIROGA, RICHARD OROZCO, JEAN STEUBING, CHARLES W. ANDERSON, FRANCIS D. COVERT, RICHARD H. MANUEL, BOBBY W. McDONALD, JACK E. BURROUGHS, DON W. BOYETT, CHARLES F. LaCELLE, RICHARD MIKLES, and MJM VENTURES,

*Petitioners,*

v.

JOHN N. EHRMAN, EHRMAN INVESTMENT GROUP, INC., W. RODERICK JOHNSON, W. RODERICK JOHNSON, P.C., RICHARD O'DONNELL, HOUSTON PETROLEUM CO., INC., JOEL A. MIDDLEBROOK, JOEL A. MIDDLEBROOK, CPA, VICTOR B. RUSSEK, RUSSEK CO., BERT GAMBLE, RIO BRAVO OIL CO., INC., ROCKWOOD INSURANCE CO. AND ROBERT E. ECKIS, JR.,

*Respondents.*

**Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit**

## HOUSTON PETROLEUM CO., INC. AND RICHARD O'DONNELL'S ("RESPONDENTS") BRIEF IN OPPOSITION

## STATEMENT OF THE CASE

Respondents Houston Petroleum Company ("HPC") and Richard O'Donnell ("O'Donnell") adopt and incorporate by reference for all purposes Rio Bravo Oil Company, Inc.'s ("Rio Bravo") and Bert Gamble's ("Gamble") Brief in Opposition to Petitioners' Petition for a Writ of Certiorari regarding the factual background, procedural background, and reasons the petition should be denied except as expressly stated otherwise herein. HPC stands in very similar shoes as Rio Bravo in that HPC is an oil and gas operator that entered into contractual agreements with Onshore permitting Onshore to invest in wells to be drilled by HPC. Likewise, O'Donnell is the president of HPC and stands in similar shoes as Gamble who is president of Rio Bravo. For these reasons, many of the facts and arguments set forth in Rio Bravo and Gamble's brief in opposition apply equally to HPC and O'Donnell. Petitioners have also failed to raise any special or significant reasons to warrant granting their petition for writ of certiorari with respect to HPC or O'Donnell.

### A. Factual Background

Like Rio Bravo, HPC's only connection with Onshore is a contractual relationship whereby HPC and Onshore entered into agreements permitting Onshore to invest in wells to be drilled by HPC. Petitioners have not alleged that HPC and O'Donnell failed to actually drill on certain agreed upon sites. Unlike many of the oil and gas programs promoted during the early 1980's, Onshore is a program that actually drilled and recovered oil and gas and has made payments to the Petitioners. Petitioners are merely dissatisfied because their investment strategy to get rich from an investment that looked lucrative in 1984 did not turn out quite as planned.

Neither HPC nor O'Donnell were involved in the promotion, offering, or sale of any interests in Onshore nor were they investors, partners, or owners in any interests of Onshore. Petitioners, as plaintiffs below, brought suit against HPC and O'Donnell, among others, alleging violations of federal and state securities laws, the Racketeer Influenced & Corrupt Organizations Act ("RICO"), and common law fraud. The undisputed and uncontroverted evidence produced to the District Court established that HPC and O'Donnell were not involved in the selling of limited partnership interests in Onshore nor did they make any representations, misrepresentations, or omissions of fact to any potential investor in Onshore. This evidence further established that neither HPC nor O'Donnell were involved in any RICO activities. This uncontroverted evidence was gleaned from extensive discovery that took place for over eighteen months after suit was filed and included numerous depositions of Petitioners, Respondents, and other witnesses.[1] Petitioners failed to provide any deposition testimony, counter-affidavits, or other competent evidence in their Response to Houston Petroleum Co., Inc. and Richard O'Donnell's Motion for Summary Judgment ("Response") that controverted or refuted the evidence produced by HPC and O'Donnell in support of their Motion for Summary Judgment.[2]

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1. Sworn affidavits were also provided as evidence supporting HPC and O'Donnell's Motion for Summary Judgment.

2. A copy of HPC and O'Donnell's Motion for Summary Judgment (without deposition exhibits) is provided in the Appendix to Respondents' Brief as H.1-H.39 Petitioner's Response to HPC and O'Donnell's Motion for Summary Judgment (with one exhibit attached) is provided in the Appendix to Respondent's brief as H.40-H.56. A copy of the supporting affidavit of O'Donnell is attached as H.35-H.38. All references to the Appendix are designated by an "H." preceding the page number.

## B. Procedural Background

Like Rio Bravo and Gamble's motion, HPC and O'Donnell's Motion was supported by competent evidence in the form of sworn affidavits and deposition excerpts. The affidavit of Richard O'Donnell contained testimony that neither HPC nor O'Donnell (1) participated in any way in the preparation of the offering materials or prospectus promoting Onshore; (2) had any involvement with the selling activities undertaken on behalf of Onshore nor were they aware of the sales efforts made; (3) played any role in the offering of securities to Petitioners or any other investors, made any representations to any Petitioner, had any contact with any investor prior to their investments, or even knew any Petitioner's identity prior to the filing of the lawsuit; (4) played any part in or have control over the operation or management of Onshore; (5) had any control of any Onshore officer or employee or had any control over any of the policies, management, decisions, or any aspects of the business of Onshore; (6) were aware of any fraud or alleged fraud of any party perpetrated or sought to be perpetrated against any investor nor intended to render any assistance in any alleged fraud; (7) involved in or participated in any RICO activities or enterprise; (8) attempted to control any RICO enterprise or acquire an interest in or maintain an interest in a RICO enterprise; (9) participated in any racketeering activity; (10) obtained a financial interest in Onshore; (11) had any control over the affairs of Onshore; (12) had any position with Onshore that facilitated the perpetration of any alleged predicate acts; or (13) knowingly or wilfully become part of any alleged conspiracy. (H.35-H.38). Deposition testimony was also produced in support of the facts set forth in O'Donnell's affidavit and referenced in Respondents' Motion. (H.11, H.13, H.16-H-17, H-23, H.29). In addition, uncontroverted deposition testimony of the Petitioners established that neither HPC nor O'Donnell

made any statements to Petitioners in the offering or selling of interests in Onshore. *See* H.11, H.16-H.17, H.23. Therefore, the evidence produced by HPC and O'Donnell in support of their Motion was not only competent but also specific and substantial.

On July 26, 1989, Petitioners filed an untimely response to HPC and O'Donnell's Motion which the District Court graciously considered. (H.40-H.52). Petitioners' Response was filled with statements that the evidence produced at trial "will establish" Respondents' "culpability" and "will establish" that Respondents were participants in a scheme to defraud Petitioners. (H.43, H.46-H.47, H.49-H.51). Petitioners also asserted that they "must be given the opportunity to prove" Respondents participated in the alleged scheme and that they "will show at trial" or "will be able to show" at trial how Respondents engaged in this alleged scheme. (H.46-H.47, H.49-H.51). No evidence, competent or otherwise, was produced to the District Court to refute or controvert the specific, competent, and sworn testimony produced by HPC and O'Donnell in support of their Motion. The only "evidence" produced at all that refers to HPC is an unsworn and unsigned "stream of consciousness" letter that makes a single reference to HPC as "crooks."[3] (H.53-H.56). This, as the District Court stated, proves nothing. Petitioners failed to produce *any* sworn evidence through affidavits or deposition testimony to controvert the evidence produced by HPC and O'Donnell. As a result, the District Court granted HPC and O'Donnell's Motion and the Fifth Circuit panel affirmed that decision. Any additional "evidence" Petitioners seek to have this Court review is equally without competence and is not properly before this Court.

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3. Nowhere in the letter is Richard O'Donnell mentioned or even referenced.

## REASONS THE PETITION SHOULD BE DENIED

Without burdening this Court with cumulative arguments and authorities, HPC and O'Donnell adopt and incorporate by reference for all purposes the arguments and authorities set forth in Rio Bravo's and Gamble's Brief in Opposition to Petitioners' Petition for a Writ of Certiorari. The exact same allegations made against Rio Bravo and Gamble are made against HPC and O'Donnell. Similar evidence and proof that was produced by Rio Bravo and Gamble in support of their motion was produced by HPC and O'Donnell in support of their Motion. Petitioners similarly failed to produce any evidence or proof in their Response to refute or contradict the evidence produced by HPC and O'Donnell.

Petitioners have also alleged violations of the RICO statute against HPC and O'Donnell. These points are more thoroughly addressed in Respondents' Brief to the United States Court of Appeals for the Fifth Circuit and Respondents' Motion for Summary Judgment. Both are incorporated for all purposes and attached in the Appendix hereto. (H.1-H.39, H.57-H.121).

The only "evidence" presented to the District Court in Petitioners' Response was an unsigned and unsworn letter. (H.53-H.56). This letter is not only incompetent summary judgment evidence since it is unsworn, unverified, and unsigned, but the letter does not state any specific facts tending to show that there is a genuine issue for trial. Nowhere in the letter does it have any specific facts or statements implicating HPC or O'Donnell in any alleged RICO enterprise, violation of securities law, or scheme to defraud investors in Onshore. As the District Court held, this proves nothing. Even assuming this letter is competent evidence, it is not specific nor sufficient to raise a genuine

issue for trial. For these reasons, and in accordance with this Court's decision in ***Celotex Corp. v. Catrett***, 477 U.S. 317 (1986), Petitioners petition should be denied.

## CONCLUSION

The judgment of the District Court and subsequent affirmation by the Fifth Circuit Court of Appeals involves no unsettled questions of law and is entirely consistent with the prior rulings of the Court and other federal circuit courts. The questions that Petitioners raise are neither special nor significant. Therefore, the petition should be denied.

Respectfully submitted,

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**APPENDIX**

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| MICHAEL K. TOPALIAN, et al., | § | |
| Plaintiffs, | § | |
| | § | Civil Action |
| vs. | § | No. 87-3826 |
| | § | |
| JOHN N. EHRMAN, et al., | § | |
| Defendants. | § | |

**MOTION OF DEFENDANTS HOUSTON PETROLEUM CO., INC. AND RICHARD O'DONNELL FOR SUMMARY JUDGMENT**

Defendants Houston Petroleum Co., Inc. ("HPC") and Richard O'Donnell ("O'Donnell"), pursuant to Rule 56 of the Federal Rules of Civil Procedure, file this motion for summary judgment. In support thereof, HPC and O'Donnell would show as follows:

1. As more fully discussed in the accompanying Memorandum, HPC and O'Donnell are entitled to summary judgment on all claims because there are no genuine issues as to any material fact and there is an absence of any evidence to support plaintiffs claims.

2. As more fully discussed in the accompanying Memorandum, HPC and O'Donnell are entitled to summary judgment on plaintiffs' claims under the Securities Act of 1933 on the ground that they are not sellers within the meaning of the Act.

3. As more fully discussed in the accompanying Memorandum, HPC and O'Donnell are entitled to summary judgment on plaintiffs' claims under the Securities Exchange Act of 1934 on the ground that they made no representations or omissions of fact to plaintiffs.

4. As more fully discussed in the accompanying Memorandum, HPC and O'Donnell are entitled to summary judgment on plaintiffs' RICO claims on the ground that they did not engage in a pattern of racketeering activities by acquiring, investing or controlling a RICO enterprise. Moreover, plaintiffs have no standing to assert a RICO claim against HPC and O'Donnell because their damages do not arise by reason of such violation.

5. In further support of this motion, HPC and O'Donnell incorporate the Memorandum In Support of Defendants Houston Petroleum Co., Inc. and Richard O'Donnell's Motion for Summary Judgment.

WHEREFORE, HPC and O'Donnell respectfully request that the Court grant its motion for summary judgment, and enter an order that plaintiffs take nothing, and grant HPC and O'Donnell such other and further relief to which this Court may deem them justly entitled.

Respectfully submitted,

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RICHARD O'DONNELL

**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the foregoing was mailed this 15 day of June, 1989, to:

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| MICHAEL K. TOPALIAN, et al., Plaintiffs, | § | |
| | § | Civil Action |
| vs. | § | No. 87-3826 |
| JOHN N. EHRMAN, et al., Defendants. | § | |

**MEMORANDUM IN SUPPORT OF DEFENDANTS HOUSTON PETROLEUM CO., INC. AND RICHARD O'DONNELL'S MOTION FOR SUMMARY JUDGMENT**

Houston Petroleum Co., Inc. ("HPC") and Richard O'Donnell ("O'Donnell"), two of the defendants in the above action, file this Memorandum in support of their motion for summary judgment and would show the following:

## I.
## BACKGROUND

Plaintiffs are dissatisfied investors in Onshore Exploration, Ltd., 1984 Mid-Year Drilling Program ("Onshore"), an oil and gas drilling limited partnership program. First Amended Complaint at 2-4 ¶ 1-5 ("Complaint"). These investments were highly leveraged tax shelters promoted by John Ehrman and Ehrman Investment Group. Wayne Byles was the original general partner in Onshore. In December 1984 he was succeeded by Rod Johnson and Ehrman Investment Group as co-general partners. Complaint at 8 ¶ 46; 9 ¶ 49. HPC is an oil and

gas operator that entered an agreement with Onshore to drill wells on certain sites. Complaint at 9 ¶ 49. O'Donnell is the President of HPC and has been sued individually and as President. Complaint at 1.

Unlike many of the oil and gas programs promoted during the early 1980s, Onshore is a program that actually drilled and recovered oil and gas and has made payments to the plaintiffs. *See* Complaint at 25 ¶ 110. In fact, Onshore continues in operation today. Plaintiffs are not dissatisfied because their promoter stole their money, the general partner is in bankruptcy, or no drilling was ever completed. Instead, plaintiffs are dissatisfied because their investment strategy to get rich from an investment that looked lucrative in 1984 did not turn out quite as planned. *E.g.*, Binder dep. at 45-46. Unfortunately, because of the inherent risk associated with oil and gas drilling, one of which is the price of oil and gas and the fact that such prices have plummeted since 1984, these programs did not turn out to be as immediately profitable as the plaintiff investors anticipated. Binder dep. at 45-46; Garcia-Quiroga dep. at 98, 101; Steubing dep. at 69-70, 107-08. Therefore, plaintiffs have brought this action claiming a laundry list of fraud and deception to get out of their investments. Complaint at 3-4.

Included among their claims are claims against HPC and O'Donnell for alleged violations of the federal and state securities laws, common law fraud and Racketeering Influenced & Corrupt Organization Act ("RICO"). The undisputed evidence establishes that HPC and O'Donnell were not involved in the selling of plaintiffs' limited partnership interests, made no misrepresentations or omissions of fact to the investors, and were not involved in any RICO activities. Thus, because there is a lack of evidence to support at least one essential element of each of the plain-

tiffs' claims, HPC and O'Donnell are entitled to summary judgment in their favor.

## II.
## STANDARD FOR SUMMARY JUDGMENT

Summary judgment is properly granted if the pleadings and evidence "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The Supreme Court recently clarified the burden of a party seeking summary judgment. In *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986), *cert. denied*, 108 S.Ct. 1028 (1988), the Supreme Court held that the moving party may discharge its burden by showing an absence of evidence to support the nonmovant's case. Thus, the Court stated, "Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322; *accord Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1195 (5th Cir. 1986).

"Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is 'no genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). A mere scintilla of evidence in support of plaintiffs' position is not sufficient to survive summary judgment. Plaintiffs must point to particular evidence on which the jury could reasonably find in their favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Furthermore, the nonmovant may not survive summary judgment by resting on mere allegations in their pleadings. *Isquith v. Middle S.*

*Utils., Inc.*, 847 F.2d 186 (5th Cir.), *cert. denied*, 109 S.Ct. 310 (1988). The evidence in this case demonstrates that plaintiffs cannot establish each of the essential elements of the claims asserted against HPC and O'Donnell and therefore summary judgment in their favor is proper.

## III.
## HPC AND O'DONNELL DID NOT VIOLATE ANY PROVISION OF THE SECURITIES ACT OF 1933

Plaintiffs' allegations under sections 12 and 15 seek to impose liability on HPC and O'Donnell for alleged oral and written misrepresentations in connection with the sale of their partnership interests. Recent Supreme Court and Fifth Circuit precedents demonstrate conclusively that no liability for any violations of the Securities Act of 1933 can be leveled against HPC and O'Donnell because they do not meet the statutory definition of "seller" under the Act, and therefore they are entitled to summary judgment.

### A. Elements of Section 12 and 15 Claims

Plaintiffs' Complaint contains vague, confusing and essentially meaningless cross-references that attempt to assert a cause of action under sections 12 and 15 of the Securities Act of 1933, 15 U.S.C. § 77(l), (o) (1982), against HPC and O'Donnell. Complaint at 29, 34 and 39. Section 12(1) provides a right of action against anyone who offers or sells a security in violation of § 77(e), which makes it unlawful to use interstate commerce as the means to sell a security unless a registration statement is in effect and the prospectus meets the requirement of the Act. 15 U.S.C. § 77(l)(1). Section 12(2) provides a private cause of action against any person who offers or sells a security through communications which include material misrepresentations or omissions of material facts. *Id.* § 77(l)(2). Section 15 provides a private right of

action against any person who controls any person liable under sections 12(1) or 12(2). *Id.* § 77(o). To come within the ambit of these statutory provisions, plaintiffs must establish that HPC and O'Donnell were "sellers" of their securities.[1]

### B. HPC and O'Donnell are not "Sellers"

The Supreme Court redefined persons liable under section 12(1) of the Securities Exchange Act of 1934 in *Pinter v. Dahl*, 108 S.Ct. 2063 (1988), finding that the proper inquiry is into the relationship between the investor and the defendant; *not* the defendant and the transaction. *Id.* at 2080-81. In directing this inquiry, the Court specifically held that section 12(1) "imposes liability on the owner who passed title, or other interest in the security, to the buyer for value," as well as one who "engaged in solicitation." *Id.* at 2076. The Fifth Circuit, following *Pinter's* guidance, extended that definition of seller to cover claims asserted

---

1 1.The statute of limitations applicable to actions under sections 12 and 15 is set forth in section 13, which provides that actions to enforce liabilities under sections 12 and 15 must be brought either within three years of the sale to plaintiffs, or within one year of the discovery of the fraud, whichever period is shorter. 15 U.S.C. § 77(m) (1982), *see Buder v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 486 F. Supp. 56 (E.D. Mo. 1980). In no circumstances may an action be brought more than three years after the security is purchased. Moreover, plaintiffs' sections 12 and 15 claims should be dismissed because section 13 provides that actions must be brought within one year of discovery or after "discovery should have been made by the exercise of reasonable diligence. ..." 15 U.S.C. § 77(m). Nowhere in the Complaint does any plaintiff allege when he discovered, or should have discovered the alleged fraud. A plaintiff must affirmatively allege compliance with section 13; failure to make such an allegation is grounds for dismissal. *See, e.g., Stewart Coach Indus., Inc. v. Moore*, 512 F. Supp. 879, 886 (S.D. Ohio 1981); *Kramer v. Scientific Control Corp.*, 352 F. Supp. 1175, 1176 (E.D. Pa. 1973).

under section 12(2) of the Act. *Abell v. Potomac Ins. Co.*, 858 F.2d 1104 (5th Cir. 1988). The Court of Appeals held that when a court examines any claim under section 12, two inquiries must be made: "(1) [w]ho passed title to the plaintiff or solicited the transaction in which title passed; and (2) from whom did the plaintiff buy the security?" *Id.* at 1114.

Every case citing to and following *Pinter* has expressly declared that a plaintiff must demonstrate that each defendant "actually solicited their investment" for section 12 liability to attach. *See, e.g., Capri v. Murphy*, 856 F.2d 473, 479 (2d Cir. 1988) (noting that Second Circuit precedent previously held that language of sections 12(1) and 12(2) is identical"); *accord Schlifke v. Seafirst Corp.*, 1989 Fed. Sec. L. Rep. (CCH) ¶ 94,174 (7th Cir. Jan. 9, 1989) (holding that a bank that financed allegedly illegal oil and gas limited partnerships was not a "seller" since it did not actively participate in the solicitation of investors or engage in preparing the prospectus except for drafting the loan documents included therein); *Harelson v. Miller Fin. Corp.*, 854 F.2d 1141, 1142 (9th Cir.), *cert. denied*, 109 S. Ct. 274 (1988) (finding that salesman/agent of defendant corporation "solicited" sales of securities by presenting facts necessary to effectuate sale to purchaser and receiving compensation for bringing sale about); *In re Professional Fin. Management, Ltd.*, 692 F. Supp. 1057, 1064 (D. Minn. 1988) ("Under the *Pinter* standard, liability may be imposed against [defendants] if they were principals to the sale or otherwise assisted in the transfer of securities as brokers, and received financial benefit in return.").

Plaintiffs muster no support for a finding that either HPC or O'Donnell could be declared a seller under this standard. The record is clear that they in no way "passed title or other interest" to any plaintiff. Like the bank in

*Seafirst*, HPC or O'Donnell were not involved in the solicitation or sale of these interests. O'Donnell Affidavit, attached hereto as Exhibit A. In fact, the plaintiffs admitted during their depositions that HPC and O'Donnell had no part in the sale or their interest to them. Garcia-Quiroga dep. at 136; Boyett dep. at 86-87; Burroughs dep. at 22-23; McDonald dep. at 1066; Topalian dep. at 127; Steubing dep. at 151; LaCelle dep. at 144, 150, 156-57.

HPC was simply the drilling operator. The undisputed evidence establishes that HPC and O'Donnell were not involved in Onshore's selling efforts. HPC and O'Donnell had no contact with Onshore's sales personnel. O'Donnell's Affidavit. Likewise, there is no evidence to support the allegation that HPC and O'Donnell participated in the preparation of the prospectus or in any way promoted the program. Moreover, the record directly refutes the contention that anyone at HPC had any knowledge of Ehrman's sales tactics. O'Donnell Affidavit. The only evidence establishes the contrary: O'Donnell testified that no HPC personnel had any knowledge of or control over the means by which Ehrman or the Onshore salesmen marketed the limited partnership interests. Boyett dep. at 109; Garcia-Quiroga dep. at 159-60; Burroughs at 84-85; Steubing dep. at 166; Topalian dep. at 135-36; McDonald dep. at 1061; LaCelle dep. at 147-48.

Every passage of record testimony in this case refutes the assertion that HPC and O'Donnell engaged in the direction of or solicitation by Onshore's sales force. HPC and O'Donnell were not engaged in soliciting sales and therefore cannot be said to have been "sellers" of these interests for purposes of the 1933 Act. Plaintiffs' claims must be dismissed.

### C. HPC and O'Donnell are not "Control" Persons Under the 1933 Act

HPC and O'Donnell's total lack of control removes from possibility any liability under either the primary, secondary, or "control person" provisions of the 1933 Act. Particularly instructive here is the new decision by the Seventh Circuit in *Schlifke v. Seafirst Corp.*, 1989 Fed. Sec. L. Rep. (CCH) ¶ 94,174, at 91,592 (7th Cir. Jan. 9, 1989). In deciding that liability under the 1933 Act could not lie against defendant Seafirst, the court noted that:

> Although the Bank necessarily became involved in the transaction ... to the extent necessary to fully document and protect its loans and collateral, there is no evidence that [it] thereby intended to be making an investment or that it took any steps to induce any investment by [the borrower] with [the seller].
>
> Thus, we agree with the district court that the Bank was acting merely as a commercial lender when it extended a loan to ENI 1981-III at a fixed rate of interest.

*Id.* at 91,597 (citations omitted, ellipses in original).

The *Schlifke* court expressly refused to allow any cause of action based on "aiding and abetting" liability under section 12(2). *Id.* at 91,597-98. Likewise, in the recent decision of *Commins v. Johnson & Higgins, Inc.*, 1988 Fed. Sec. L. Rep. ¶ 94,092 (N.D. Cal. Sept. 28, 1988), the court explained that "control person" liability imposes liability "only a person who 'stands behind the scenes and controls the [securities violator] who is in a nominal position of

authority.'" *Id.* at 91,099 (quoting *Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1441 (9th Cir. 1987)).

The record specifically negates any contention that HPC or O'Donnell played any part in the operation or management of Onshore. O'Donnell Affidavit; Boyett dep. at 109; Garcia-Quiroga dep. at 159-60; Burroughs dep. at 84-85; Steubing dep. at 166; Topalian dep. at 135-36; McDonald dep. at 1061; LaCelle dep. at 147-48. The evidence clearly shows that no HPC employee or officer directed or controlled any of the policies, management, decisions, people, or any other aspects of the business of Onshore, including any sales effort. O'Donnell Affidavit.

Thus, both the record testimony and the applicable legal principles make it clear that HPC and O'Donnell played no role in the operation of Onshore or in the sale or solicitation of plaintiffs' investment interests. HPC and O'Donnell did not direct or control any Onshore employee or operation. As such, HPC was merely the drilling operator for some of the wells, and cannot be found liable under the provisions of the 1933 Act.

## IV.
## HPC AND O'DONNELL DID NOT VIOLATE ANY PROVISIONS OF THE SECURITIES ACT OF 1934

Plaintiffs additionally assert that HPC and O'Donnell violated section 10(b) of the Securities and Exchange Act of 1934, and Rule 10b-5. Plaintiffs cannot recover under either theory because HPC and O'Donnell made no misrepresentation to plaintiffs, or any representation and owed no duty to disclose and therefore made no omission of fact.

## A. Elements of Section 10(b) and 10b-5

Plaintiffs allege various violations of Section 10(b) of the Exchange Act of 1934 and Rule 10b-5. Section 10(b) provides an action by a purchaser or seller of "any security" against "any person" who used "any manipulative or deceptive device or contrivance" in connection with the purchase or sale of a security. 15 U.S.C. § 78(j)(b) (1982). Rule 10b-5 provides in material part:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security.

17 C.R.F. § 240.10b-5 (1983).

The purpose of a cause of action under § 10(b) and Rule 10b-5 is

> to protect persons who are deceived in securities transactions -- to make sure that buyers of securities get what they think they are getting and that sellers of securities are not tricked into parting with something for a price known to the buyer to be inadequate or for a consideration known to the buyer not to be what it purports to be.

*Chemical Bank v. Arthur Andersen & Co.*, 726 F.2d 930, 943 (2d Cir.), *cert. denied*, 469 U.S. 884 (1984). The essential elements of a § 10(b) and Rule 10b-5 claim are (1) in connection with a securities transaction and (2) acting with scienter, the defendants made (3) a material misrepresentation or nondisclosure (4) upon which plaintiff relied and (5) thereby suffered injury. *Chemetron Corp. v. Business Funds, Inc.*, 718 F.2d 725, 728 (5th Cir.), *vacated on other grounds*, 460 U.S. 1007 (1983); *Pin v. Texaco, Inc.*, 1986 Fed. Sec. L. Rep. (CCH) ¶ 92,823, at 94,011 (5th Cir. July 14, 1986) (under § 10(b) essential element is misrepresentation or nondisclosure).

Most significantly, the plaintiffs must prove that "the defendant(s) acted with scienter, *i.e.*, with intent to deceive, manipulate, or defraud." *Hermann & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983). The authorities are universal that this is a species of fraud. *See, e.g., id.* (§ 10(b) is a "catchall antifraud provision"); *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 472 (1977); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 203 (1976).[2] Moreover, as the

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2. In *Ernst & Ernst*, the Supreme Court refused to read a negligence or should have known standard in § 10(b) or Rule 10(b)-5 actions. The scienter requirement can be satisfied with a state of mind less than actual knowledge such as "sever recklessness." This standard requires a showing that the deception was "so obvious that the defendant must have been aware of it." *Warren v. Reserve Fund, Inc.*, 728 F.2d 741, 745 &

Supreme Court put it, "Section 10(b) is aptly described as a catchall provision, but what it catches must be fraud." *Chiarella v. United States*, 445 U.S. 222, 234-35 (1980). No plaintiff can point to any fact in support of their allegation that the defendants were guilty of fraud. Burroughs dep. at 84-85; Garcia-Quiroga dep. at 159-60; Boyett dep. at 107-09, 111; LaCelle dep. at 161-62, 183; Steubing dep. at 165-67; Topalian dep. at 135-36; McDonald dep. at 1079. Accordingly, plaintiffs cannot establish an essential element of their 1934 Act claim.

**B. HPC and O'Donnell Made No Representation to Plaintiffs**

To recover under 10b-5, plaintiffs must establish that HPC and O'Donnell made a misrepresentation of material fact to them in connection with their purchase of these securities. *Abell v. Potomac Ins. Co.*, 858 F.2d 1104, 1115 (5th Cir. 1988). Plaintiffs cannot recover from HPC or O'Donnell for misrepresentation because the uncontroverted testimony of the plaintiffs establishes that neither HPC or O'Donnell made *any* statements, much less untrue statements, to them. McDonald dep., Vol. VI at 1062-66; Topalian dep. at 151; Garcia-Quiroga dep. at 159; Law dep. at 76; Burroughs dep. at 84-85; LaCelle dep. at 157-163, 168-69. The lack of statement is exemplified by plaintiff Mr. Bobby W. McDonald's testimony in deposition:

> Q. Do you have any information or evidence to indicate that Richard O'Donnell or HPC made any false representations to anybody to get them to buy Onshore units?
>
> A. No, sir.

---

n.12 (5th Cir. 1984). In the present case, the plaintiffs are unable to meet even the lesser standard of "should have known."

McDonald dep. Vol. VI, at 1066. As a further example, plaintiff Charles F. LaCelle is unequivocal in his answers:

> Q. Do you have any facts that would show that HPC made any representations to you at all?
>
> A. Directly?
>
> Q. Directly or indirectly.
>
> A. No.
>
> Q. What about Mr. O'Donnell? Did he make any representations to you?
>
> A. No.
>
> Q. Would you have -- do you have any facts, or are you aware of any facts, that would show that HPC or Mr. O'Donnell assisted in any fraudulent misrepresentations that others may have made to you?
>
> A. No

LaCelle dep. at 161-62.

The failure of the plaintiffs to prove any untrue statement of material fact by HPC or O'Donnell requires that plaintiffs' 10b-5 claims be dismissed. *See Abell*, 858 F.2d at 1115-16.

### C. HPC and O'Donnell Owed no Duty to Plaintiffs

The failure of a party to disclose facts constitutes actionable fraud only if the party had a duty to disclose the facts. *E.g., Chiarella v. United States*, 445 U.S. 222, 230 (1980); *Tempo Tamers, Inc. v. Crow-Houston Four, Ltd.*, 715 S.W.2d 658, 669 (Tex. App.--Dallas 1986, writ ref'd n.r.e.). Accordingly, the first step in analyzing plaintiffs' nondisclosure claims is to determine whether HPC and O'Donnell had a duty to disclose facts to plaintiffs.

First, as drilling operator, HPC and O'Donnell owed no fiduciary duty to the plaintiffs. A fiduciary relationship generally arises only from a relationship of trust and confidence. *Thigpen v. Locke*, 363 S.W.2d 247, 252-53 (Tex. 1962). A fiduciary relationship may be created from a variety of circumstances usually involving attorney-client, parent-child or some other special relationship; but generally it does not include relationships between businessmen dealing at arms length. *Consolidated Gas & Equip. Co. v. Thompson*, 405 S.W.2d 333, 336-37 (Tex. 1966). To allow the plaintiff investors to transform this arms length transaction between the drilling operator and the partnership to create a fiduciary duty from the operator to them would jeopardize the security of contracts in Texas. *See Thigpen*, 363 S.W.2d at 253. Thus, HPC and O'Donnell had no duty to disclose based upon a fiduciary duty.

Moreover, any action HPC undertook to assure itself of the viability of these programs for which it was about to act as drilling operator, lends no support to the conclusion plaintiffs wish to draw that HPC or O'Donnell owed plaintiffs any duty to disclose facts regarding their Onshore investments. *See Schlifke*, 1989 Fed. Sec. L. Rep. (CCH) ¶ 94,174, at 91,599. As one court has noted, it is ludicrous

to contend that actions taken by a party in assessing its own risks in connection with a proposed transaction somehow translate into an affirmative duty to advise other participants in the transaction with regard to their decision whether or not to participate. *See National Union Fire Ins. Co. v. Eaton*, 701 F. Supp. 1031 (S.D.N.Y. 1988). In *Eaton*, the court found that the surety's review of the private placement memoranda for its own purposes did not require it to disclose any information to the investors. *Id.* The court noted that a surety has no duty to disclose adverse information it may have had. *See generally Delany v. Blunt, Ellis & Loewi*, 631 F. Supp. 175 (N.D. Ill. 1986) (citing *Woodward v. Metro Bank*, 522 F.2d 84 (5th Cir. 1975)); *Quintel Corp., N.V. v. Citibank, N.A.*, 589 F. Supp. 1235 (S.D.N.Y.) 1984); *Schlifke v. Seafirst Corp.*, 1987 Fed. Sec. L. Rep. (CCH) ¶ 93,107, at 95,443 (N.D. Ill. 1987), *aff'd* 1989 Fed. Sec. L. Rep. (CCH) ¶ 94,174 (7th Cir. Jan. 9, 1989); *In re Gap Stores Sec. Litig.*, 457 F. Supp. 1135 (N.D. Cal. 1978); *Ingenito v. Bermec Corp.*, 441 F. Supp. 525, 549 (S.D.N.Y. 1977).

Likewise, in *Schlifke*, the Court of Appeals refused to find any section 10(b) liability, stating that, "The bank had no communications with the investors and did not initiate the transaction or participate in it in any way that would induce the investors to rely on the bank to disclose information...." *Id.* at 91,600 (quoting *Jett v. Sunderman*, 840 F.2d 1487, 1493 (9th Cir. 1988)). Indeed, in discussing secondary 10(b) liability, the Seventh Circuit noted that routine extension of a loan does not satisfy the "substantial assistance" element. *Id.* at 91,601. The court concluded that "[e]ven affording the plaintiffs the benefit of all reasonable inferences, they had not sufficiently demonstrated that the [defendant] had 'thrown in his lot,' and ... 'joined common cause with other offenders or aided and abetted a scheme with the necessary

state of mind.'" *Id.* at 91,602 (quoting *Barker v. Henderson, Franklin, Starnes & Holt*, 797 F.2d 490, 497 (7th Cir. 1986)).

Plaintiffs also assert that even if HPC and O'Donnell were not engaging in primary fraud, they may have aided and abetted the primary fraud allegedly perpetrated by other defendants. Under the Fifth Circuit precedent, parties are subject to liability for aiding and abetting a securities violation only if the following elements are proved: (1) there must have been a security violation by the primary party; (2) the aider and the abetter must have had a "general awareness" of its role in a Rule 10b-5 violation; (3) the aider and abetter must have knowingly rendered "substantial assistance" in the Rule 10b-5 violation. *Abell*, 858 F.2d at 1126; *accord Bane v. Sigmundr Exploration Corp.*, 848 F.2d 579 (5th Cir. 1988); *Woodward v. Metro Bank*, 522 F.2d 84 (5th Cir. 1975).

To establish the "general awareness" element, plaintiffs must prove HPC and O'Donnell's knowledge of their role in a fraud, and their commitment (or intent) to aid in the fraud's success:

> Scienter, then would require first that the alleged abettor know of the fraud's existence and generally understand how its actions aid in promoting the success of the fraud. The second element of scienter-commitment would be met where evidence shows that the abettor acts from a desire to help the fraud succeed...
>
> If the evidence shows no more than a transaction constituting the daily grist of the mill, we would be loathe to find 10b-5 liabil

-ity *without clear proof of intent to violate the securities laws.*

*Abell*, 858 F.2d at 1127, (citing *Woodward*, 522 F.2d at 97) (emphasis added).

HPC and O'Donnell played no role in the offering of the securities. O'Donnell Affidavit. HPC nor O'Donnell knew of the existence of any alleged fraud. *See Bane*, 848 F.2d at 581. In *Bane*, the defendant was a lender who included loan documents in an investment package for an oil and gas limited partnership and made loans to some of the plaintiffs. *Id.* at 580. The court held that the inclusion of documents in investors packages and loaning money to the investors did not constitute substantial assistance for aiding and abetting liability under Rule 10b-5. *Id.* at 581.

In this case, HPC acted solely as the drilling operator. Thus, HPC was even more removed from the plaintiffs' investments than the surety, lender or escrow agent in *Eaton, Schlifke* and *Bane*. HPC did not review the investors' financial information and did not even know their identity until this lawsuit was filed. O'Donnell Affidavit. HPC had no contact or communication in even the most remote sense with any of the investors prior to their investment. O'Donnell Affidavit. HPC did not contribute to the prospectus. O'Donnell Affidavit. Although a copy of the agreement between Onshore and HPC was attached to the prospectus, as in *Bane*, this is not sufficient to reestablish substantial assistance. As plaintiffs admit in their Complaint, HPC's limited role was fully disclosed in the prospectus. Complaint at 12-14. Plaintiffs have no basis for asserting that HPC or O'Donnell had any duty to disclose, therefore, there is no basis for imposing liability on HPC or O'Donnell under section 10(b) and Rule 10b-5.

## V.
## HPC AND O'DONNELL DID NOT VIOLATE THE TEXAS SECURITIES LAW

Plaintiffs allege generally the HPC and O'Donnell's actions violated the Texas Blue Sky Securities Act, Tex. Rev. Civ. Stat. Ann. art. 581-33 (Vernon Supp. 1989). The elements necessary to establish a violation of the Texas Securities Act are substantially similar to those necessary to establish a violation of Rule 10b-5. Thus, a failure to prove a violation of Rule 10b-5 generally is considered a failure to prove a Texas Securities Act violation. *See Keasler v. Natural Gas Pipeline Co. of Am.*, 569 F. Supp. 1180 (E.D. Tex. 1983), *aff'd*, 741 F.2d 1380 (5th Cir. 1984); *Jeanes v. Henderson*, 688 S.W.2d 100 (Tex. 1985); *Sibley v. Horn Advertising Inc.*, 505 S.W.2d 417 (Tex. Civ. App.--Dallas 1974, writ ref'd n.r.e.), *cert denied*, 420 U.S. 929 (1975). Because plaintiffs cannot establish that HPC and O'Donnell violated Rule 10b-5, they likewise cannot establish a violation of the Blue Sky laws. Therefore, HPC and O'Donnell are entitled to summary judgment as a matter of law.

## VI.
## HPC AND O'DONNELL DID NOT COMMIT COMMON LAW FRAUD

Plaintiffs cannot recover against HPC or O'Donnell on a theory of common law fraud. The elements of actionable fraud in Texas are (1) that a material representation was made; (2) that it was false; (3) that, when the speaker made it, he knew it was false or made recklessly without any knowledge of its truth and as a positive assertion; (4) that they made it with the intention that it should be acted upon by the party; (5) that the party acted in reliance upon it; and (6) that he thereby suffered injury.

*South Hampton Co. v. Stinnes Corp.*, 733 F.2d 1108 (5th Cir. 1984); *Trenholm v. Ratcliff*, 646 S.W.2d 927 (Tex. 1983). As discussed above, plaintiffs admitted in their depositions that neither HPC nor O'Donnell made any representations to them, or consequently any misrepresentations. McDonald dep. Vol VI at 1062-66; Topalian dep. at 151; Garcia-Quiroga dep. at 159; Law dep. at 76; Burroughs dep. at 84-85; LaCelle dep. at 157-63, 168-69. Because plaintiffs cannot establish the elements necessary to establish fraud, HPC and O'Donnell are entitled to summary judgment.

## VII.
## HPC AND O'DONNELL DID NOT VIOLATE THE RICO ACT

Plaintiffs assert RICO claims against HPC and O'Donnell based upon allegations of illegal kickbacks, and inflated contractual drilling prices. RICO prohibits four forms of activity: (1) investment in an enterprise engaged in or affecting interstate or foreign commerce of income obtained through a pattern of racketeering or through collection of an unlawful debt, (2) acquisition of an interest in such an enterprise through a pattern of racketeering or through collection of an unlawful debt, (3) conduct of the affairs of such an enterprise through a pattern of racketeering or through collection of an unlawful debt, and (4) conspiracy to violate any of these three provisions. Civil remedies are available for violations of section 1962 to persons injured "by reason of" such RICO activities. Plaintiffs' claims must fail because they cannot establish any of the essential elements of RICO and plaintiffs have no standing to assert RICO against HPC and O'Donnell.

### A. Elements of a Civil RICO Case

The civil RICO statutes provide a private cause of action for any person injured in his business or property by reason of a violation of RICO. The injured person may seek redress for treble damages against the person or persons who caused his injury. 18 U.S.C. § 1964(c) (1982). To establish a RICO violation under any subsection of 1962, the essential elements are as follows: (1) a "person" (the defendant), (2) through the commission of two or more predicate acts, (3) constituting a "pattern" of "racketeering activity", directly or indirectly invests in (§ 1961(a)), or maintains an interest in (§ 1962(b) ), or participates in (§ 1962(c)), an "enterprise", the activities of which affect interstate commerce, causing plaintiff injury in his business or property "by reason of" the defendants' activity. *Ocean Energy II, Inc. v. Alexander & Alexander, Inc.*, 868 F.2d 740, 742 (5th Cir. 1989); *Moss v. Morgan Stanley, Inc.* 719 F.2d 5, 17, 20-23 (2d Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984). Plaintiffs' claims must fail because there is no evidence to support any allegation that HPC or O'Donnell engaged in a pattern of racketeering activities or that plaintiffs' injury was caused by such acts.

### B. Plaintiffs Lack RICO Standing

Section 1964(c) authorizes a suit by any person injured in "his business or property *by reason* of a violation of § 1962." 18 U.S.C. § 1964(c) (1982). Thus, the Supreme Court has stated that anyone injured in his business or property as a result of a defendant engaging in a pattern of racketeering activity in a manner forbidden by § 1962 has a claim. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496-97 (1985). In a case presenting similar allegations as this one, the Fifth Circuit in construing RICO's standing requirement examined whether the plaintiffs were injured by

the conduct constituting the violation and whether the harm suffered was caused by the predicate acts. *See National Enters., Inc. v. Mellon Fin. Servs. Corp. No. 7*, 847 F.2d 251, 252-53 (5th Cir. 1988). In *Mellon*, the plaintiff creditor alleged it was injured by illegal kickbacks a company paid to its primary lender as a condition of financing, asserting that these kickbacks depleted the funds of the corporation which eventually declared bankruptcy. The Court found that the plaintiff's damages were too indirect, speculative and "beyond the pale of rational causation." *Id.* at 254. Thus, the court found the plaintiff lacked standing to assert a RICO claim.

In this instance, although plaintiffs' allegations are vague and somewhat unintelligible, they appear to claim that alleged kickbacks HPC made to Johnson, one of the general partners, and over charges it made to Onshore for drilling caused them injury. *See* Plaintiffs' Response to RICO Standing Order at 11, 31-33. Like in *Mellon*, plaintiffs who are investors in the limited partnership suffered no direct injury, if any, as a result of such alleged activity. Their injuries, if any, are too remote and speculative to have "flowed" from the commission of the predicate acts. *See Mellon*, 847 F.2d at 254, Therefore, they lack standing to assert RICO claims against HPC and O'Donnell.

### C. Plaintiffs Cannot Establish the Existence of a Enterprise

Plaintiffs' claims must be dismissed because there is no proof to support their allegations that Onshore is the RICO enterprise. The existence of an "enterprise" is a crucial element of plaintiffs' RICO claim. *See Sedima*, 473 U.S. at 496-97; *United States v. Turkette*, 452 U.S. 576, 583 (1981). An "enterprise" includes any "individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact

although not a legal entity." 18 U.S.C. § 1961(4). The Supreme Court defined an "enterprise" in the context of § 1962:

> The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct[,] ... proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associated function as a continuing unit. ... The "enterprise" is not the "pattern of racketeering activity"; it is an entity separate and apart from the pattern of activity in which it engages.

452 U.S. at 583. The Fifth Circuit defined "enterprise" as requiring, in addition,

> the existence of a decision making structure, whether hierarchial or consensual. The RICO enterprise must have a common or shared purpose and continuity of structure and personnel.

*Shaffer v. Williams*, 794 F.2d 1030, 1032 (5th Cir. 1986) (citations omitted). To establish an "association in fact" enterprise, a plaintiff must show (1) an ongoing organization, formal or informal, (2) the association had a common purpose of engaging in a course of conduct, and (3) its various members functioned as a continuing unit. *Turkette*, 452 U.S. at 583; *Montesano v. Seafirst Commercial Corp.*, 818 F.2d 423,427 (5th Cir. 1987); *Shaffer*, 794 F.2d at 1032.

The Fifth Circuit recently elaborated on the distinction between the pattern and the enterprise:

> When the alleged section 1962(c) violator is a legal entity, such as a corporation, this required separation is not established merely by showing that the corporation, through its employees, officers, and/or directors, committed a pattern of predicate acts in the conduct of its own business. *Atkinson*. Nor does the fact that individual officers and employees of a corporation, in the course of their employment associate together and commit in the conduct of the corporation's business a pattern of predicate acts in its name and on its behalf, suffice to constitute such officers and employees (alone or together with the corporation itself) an association in fact enterprise distinct from the corporation. *Id*. And, in *Montesano* we also explained that a RICO plaintiff must plead specific facts that establish an association that exists other than merely to commit the predicate acts that show pattern. 818 F.2d at 427,

*Old Time Enters., Inc. v. International Coffee Corp.*, 862 F.2d 1213, 1217-18 (5th Cir. 1989). The plaintiffs' allegations in their response to the Court's RICO Standing Order identifies the enterprise as Onshore. *See* Plaintiffs' Response to RICO Standing Order at 31 ¶ 6(a). There is no evidence to support the contention that Onshore functioned for the common purpose other than conduct of its own business. Neither is there any proof of any association-in-fact among the various defendants that includes HPC and

O'Donnell. O'Donnell Affidavit. Thus, plaintiffs cannot establish the existence of a RICO enterprise.

### D. Plaintiffs Cannot Establish a Pattern of Racketeering Activity

Plaintiffs' RICO claims should be denied because they have not established that defendants committed a pattern of racketeering activity. A "pattern" or racketeering activity "requires at least two acts of racketeering activity." 18 U.S.C. § 1961(5) (1982). The Supreme Court in *Sedima* gave some insight to the "pattern" requirement:

> [A] pattern "*requires* at least two acts of racketeering activity, " § 1961(5) (emphasis added), not that it "means" two such acts. The implication is that while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a "pattern," The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate Report explained: "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern." . . . of the same bill, Congress was more enlightening: "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are

> interrelated by distinguishing characteristics and are not isolated events."

473 U.S. at 496 n.14 (citations omitted)

Since *Sedima*, the great weight of authority has required a rigorous showing on this element. *See Smith v. Ayres*, 845 F.2d 1360, 1365-66 n. 18 (5th Cir. 1988); *Crocker v. FIDC* 826 F.2d 347, 348 n.2 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 1075 (1988); *Montesano v. Seafirst Commercial Corp.*, 818 F.2d 423,426 (5th Cir. 1987); *Smoky Greenhaw Cotton Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 785 F.2d 1274, 1280-81 n. 7 (5th Cir. 1986), *cert denied*, 482 U.S. 928 (1987). Thus, plaintiffs must establish at least two predicate acts of racketeering activity, which are indictable as defined in the 18 U.S.C. § 1961(1)(A), that show "continuity plus relationship" with the legitimate business. *Old Time Enters., Inc.*, 862 F.2d at 1217. Plaintiffs' allegations fail to meet this "continuity plus relationship" test. Plaintiffs allege that HPC paid kickbacks to Johnson and over charged Onshore. There is no proof that these alleged acts were anything other than isolated instances.

Moreover, plaintiffs have no evidence that the alleged "predicate acts" constitute kickbacks or that HPC overcharged Onshore. RICO's definition of racketeering activity contains a laundry list of offenses which constitute the predicate acts necessary to establish a violation. 18 U.S.C. § 1961(1). Such acts must be acts "indictable" or "punishable" under one of several listed federal criminal laws or "chargeable" under a listed state law. *Id.* § 1961(1)(A). The alleged kickbacks were payments from HPC to Johnson arising from transactions wholly unrelated to Onshore. O'Donnell Affidavit. As Johnson testified the transactions transpired prior to his affiliation with Onshore. Johnson dep.

at 32, 35-36, 24. Johnson confirms that such payments were not kickbacks. Johnson dep. at 77. Likewise, the auditor hired to review HPC's books and records testified that he found no evidence that the payments were kickbacks. Leggio dep. at 242-44. Furthermore, the alleged overcharges are consistent with market prices and the contractual agreement in existence between Onshore and HPC. O'Donnell Affidavit. Thus, because plaintiffs cannot establish that HPC committed "predicate acts" that constitute a "pattern" or racketeering activity, HPC and O'Donnell are entitled to summary judgment.

### E. Plaintiffs Cannot Establish the Activities Prohibited Under RICO

Plaintiffs cannot establish that HPC or O'Donnell derived income through a pattern or invested income, acquired or maintained an interest in, or controlled a RICO enterprise through a pattern of RICO activity. Therefore, their claims must fail.

To establish a violation of § 1962(a), the plaintiffs must establish that HPC and O'Donnell "derived income" from a "pattern" of "racketeering activity" in which they participated as principals; and that they used or invested that income to acquire an interest in, establish or operate the enterprise. *H.J., Inc.*, 648 F. Supp. at 428 n. 7. There is no evidence that either HPC or O'Donnell used or invested income derived from a pattern of racketeering activity in Onshore for any purpose. In fact, HPC and O'Donnell had no financial interest in Onshore. O'Donnell Affidavit.

Under 1962(b), the plaintiffs must establish that HPC and O'Donnell "acquired or maintained" an interest or "control" of the enterprise through a "pattern" of "racketeering activity." The object of the activity must be to

gain the interest or acquire control. Control is not limited by stock or capital ownership but may exist when the defendant has some meaningful ability to direct or influence the affairs or actions of the enterprise. *E.g., Sutliff, Inc. v. Donovan Cos.*, 727 F.2d 648, 653 (7th Cir. 1984). Again, there is no evidence that either HPC or O'Donnell gained an interest or controlled the affairs or actions of Onshore. The only evidence is to the contrary. O'Donnell Affidavit.

To establish a violation of § 1962(c), the plaintiffs must establish that HPC and O'Donnell were "employed by or associated with" the enterprise and "conducted" or "participated" in the conduct of the affairs of the enterprise through a pattern of racketeering activity. *Montesano*, 818 F.2d at 424. To satisfy the conduct element, the Fifth Circuit has held that the person must be able to commit the predicate offenses solely by virtue of his position in the enterprise, or the predicate offenses must be related to the activities of that enterprise. *United States v. Cauble*, 706 F.2d 1322, 1341 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984). The *Cauble* court, adopted the following test:

> A defendant does not "conduct" or "participate in the conduct" of a lawful enterprise's affairs, unless (1) the defendant has in fact committed the racketeering acts as alleged; (2) the defendant's position in the enterprise facilitated his commission of the racketeering acts, and (3) the predicate acts had some effect on the lawful enterprise.

*Id.* at 1332-33. There is no evidence that HPC or O'Donnell had any position with Onshore that facilitated the commission of the alleged predicate acts. The only evidence is to the contrary. O'Donnell Affidavit. Thus, their claims must fail.

Section 1962(d) makes it unlawful to conspire to violate § 1962(a), (b), or (c). To establish a violation of § 1962(d), plaintiffs must establish that: (1) two or more persons entered into an unlawful agreement to violate § 1962(a), (b), or (c), as those offenses have previously been defined; (2) HPC and O'Donnell knowingly and willfully became members of the conspiracy; (3) HPC and O'Donnell agreed to commit at least two of the acts of racketeering activity alleged by plaintiffs to create a pattern; and (4) one of the members of the conspiracy knowingly committed at least one overt act in furtherance of the conspiracy alleged. *United States v. Cauble*, 706 F.2d at 1341; *United States v. Phillips*, 664 F.2d 971, 1012 (5th Cir. 1981), *cert. denied*, 459 U.S. 906 (1982); *United States v. Elliott*, 571 F.2d 880, 902-03 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978). Plaintiffs must establish that HPC and O'Donnell objectively manifested intent to participate in the affairs of the enterprise. *Cauble*, 706 F.2d at 1341. There is no evidence that either HPC or O'Donnell knowingly and willfully became a member of any alleged conspiracy. The only evidence is to the contrary. *See* O'Donnell Affidavit.

## VIII.
## CONCLUSION

Wherefore, for the foregoing reasons, Houston Petroleum Co., Inc. and Richard O'Donnell urge this Court to grant their motion for Summary Judgment in its entirety.

Respectfully submitted,

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RICHARD O'DONNELL

**CERTIFICATE OF SERVICE**

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EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| MICHAEL K. TOPALIAN, et al. | § | |
| | § | |
| V. | § | CIVIL ACTION NO. |
| | § | 87-3826 |
| JOHN N. EHRMAN, et al., | § | |

**AFFIDAVIT OF RICHARD O'DONNELL IN SUPPORT OF HOUSTON PETROLEUM CO., INC. AND RICHARD O'DONNELL'S MOTION FOR SUMMARY JUDGMENT**

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| THE STATE OF TEXAS | § | |
| | § | |
| COUNTY OF HARRIS | § | |

Before me the undersigned authority on this day personally appeared RICHARD O'DONNELL, President of Houston Petroleum Co., Inc. ("HPC"), in the above-entitled and numbered cause and makes this affidavit in support of HPC and Richard O'Donnell's Motion for Summary Judgment, who, being duly sworn, deposes and says:

1. I am over 18 years old and am fully competent to make this affidavit. At all times relevant to this dispute, I have been the President of HPC, which is a Texas corporation doing business in the State of Texas with its principal place of business in Houston, Texas. In the transaction between Onshore Exploration, Ltd. 1984 Mid-Year Drilling Program and HPC, HPC acted as one of the oil and gas operators.

2. Neither HPC nor I participated in any way in the preparation of the offering materials or the prospectus that was put together to promote the program.

3. Neither HPC nor I had any involvement with the selling activities undertaken on behalf of the Onshore Exploration Program. We were unaware of the sales efforts that were made. We had no knowledge or control over the means by which the salesmen marketed the limited partnership interests.

4. Neither HPC nor I played any role in the offering of the securities to the plaintiffs or any other investors. As we were not involved in the offering of the securities, we made no representations, much less untrue statements, to any plaintiffs. Neither HPC nor I were involved in the soliciting of any investors to purchase an interest in the Onshore Exploration Program. Neither HPC nor I sold any investors their interests in this offering. We had no contact with the investors prior to their investments and did not advise them whether to purchase or whether this was a solid investment. We made no representations to the investors regarding the quality of this investment, about the program or otherwise. Neither HPC nor I reviewed the investors' financial information prior to their investment in the Onshore Exploration Program or at any time. We did not even know their identities until after the lawsuit was filed. Neither HPC nor I had any contact or communication in any sense with any of the investors prior to their investment.

5. Neither HPC nor I played any part in or had control over in the operation or management of Onshore. We did not control any Onshore Officer or employee, and we did not have any control over any of the policies,

management, decisions or any aspects of the business of Onshore, including but not limited to the sales efforts.

6. We were unaware and are still unaware of the existence of any fraud or alleged fraud by any party perpetrated or sought to be perpetrated against the investors and did not intent to render any assistance to any alleged fraud. We were and are unaware of how our actions would promote the success of any alleged fraud. We had no intent to violate any securities laws and did not violate any securities laws. We did not participate or intend to participate in any such fraud nor did we assist or intend to assist any such fraud succeed.

7. Neither HPC nor I were involved in any RICO activities. We did not participate in any RICO enterprise. We did not attempt to control any RICO enterprise, acquire an interest in, or maintain an interest in a RICO enterprise. To the best of my knowledge, Onshore is not a RICO enterprise nor is there any RICO enterprise associated with this drilling program.

8. Neither HPC nor I have participated in any pattern of racketeering activity. The payments HPC made to W. Roderick Johnson were not illegal kickbacks as plaintiffs alleged, but instead were commissions due to Mr. Johnson for transactions unrelated to the Onshore Exploration Program. HPC did not overcharge Onshore for exploration activities that it undertook. Instead, the prices charged are consistent with market prices and the contractual agreement in existence between Onshore and HPC. Neither HPC nor I had any financial interest in Onshore. Neither HPC nor I had any control over the affairs of Onshore. We did not have any position with Onshore that facilitated the perpetration of any alleged predicate acts.

9. Neither HPC nor I were knowingly or willfully a part of any alleged conspiracy.

/S/
RICHARD O'DONNELL

SWORN TO AND SUBSCRIBED BEFORE ME this 15 day of June 1989, by Richard O'Donnell.

/S/
Notary Public in and for the
State of Texas

(SEAL)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| MICHAEL K. TOPALIAN, et al., Plaintiffs, | § | |
| | § | Civil Action |
| vs. | § | No. 87-3826 |
| | § | |
| JOHN N. EHRMAN, et al., Defendants. | § | |

**ORDER GRANTING HOUSTON PETROLEUM CO.,INC. AND O'DONNELL'S MOTION FOR SUMMARY JUDGMENT**

This cause came before the Court on the Motion of Houston Petroleum Co., Inc. and Richard O'Donnell for Summary Judgment. The Court, having considered the motion and evidence on file, finds that there is no genuine issue as to any material fact and that defendants HPC and O'Donnell are entitled to judgment as a matter of law.

It is therefore, ORDERED, ADJUDGED AND DECREED that the motion of HPC and O'Donnell for Summary Judgment be and the same hereby is GRANTED. Plaintiffs shall take nothing by their action. This is a final judgment. All costs are assessed against the plaintiffs, jointly and severally.

Done this the _____ day of _____, 1989.

_____
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| MICHAEL K. TOPALIAN, et al., | § | |
| | § | |
| Plaintiffs, | § | |
| | § | Civil Action |
| VS. | § | No. 87-3826 |
| | § | |
| JOHN N. EHRMAN, et al., | § | |
| | § | |
| Defendants. | § | |

**PLAINTIFFS' RESPONSE TO THE HOUSTON PETROLEUM DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

To the Honorable Judge of said Court:

COME NOW **Michael K. Topalian, et al.,** Plaintiffs in the above styled and numbered cause, and file this their response in opposition to the Houston Petroleum Defendants' (**Houston Petroleum Company Inc.** and **Richard O'Donnell**) Motion for Summary Judgment.

The Houston Petroleum Defendants' Motion for Summary Judgment is friovolous. It represents a last-ditch effort by these Defendants to avoid a trial of this complex securities fraud and RICO case in which the evidence will clearly show that the Houston Petroleum Defendants and others engaged in acts and practices which operated as a fraud or deceit upon Plaintiffs in connection with the sale of securities.

Plaintiffs, in their First Amended Complaint (paragraphs 145 - 156), raise, in a clear and detailed manner, a number of serious allegations against the Houston Petroleum Defendants. The charges stem from the existence of a pre-Onshore attorney/client relationship between these Defendants and Onshore's second Managing general partner, Defendant W. Roderick Johnson and and his law firm, W. Roderick Johnson, P.C.

The nature of such a relationship is naturally suspect for allegations of conflict of interest and, in the instant case, as will be shown below, the relationship, in fact, led to self-dealings resulting in "kick-backs" (from the Houston Petroleum Defendants to the Johnson Defendants) in excess of ONE HUNDRED THOUSAND ($100,000.00) DOLLARS at the expense of Onshore and its investors, including Plaintiffs.

Plaintiffs' accusations are corroborated by the Johnson Defendants, themselves. In their February 11, 1988, Motion to Dismiss, the Johnson Defendants made the below quoted admissions relevant to Plaintiffs' allegations against the Houston Petroleum Defendants:

> "... As a result of an EIG-initiated audit,... EIG demanded and received an adjustment and a refund of moneys it had paid Houston Petroleum Company. In other words, **EIG WAS THE VICTIM OF SUCH ACTS AND EHRMAN AND EIG TOOK TIMELY ACTION... TO PROTECT THE INTERESTS OF THE HOLDERS OF THE LP UNITS."** (Emphasis added).

Defendant Joel A. Middlebrook, CPA and bookkeeper for the Partnership, also corroborates the Ehrman and

Johnson Defendants' position regarding the Houston Petroleum Defendants. In a January 22, 1986, letter to John N. Ehrman (Plaintiffs' Exhibit "A"), Ms. Middlebrook, in relevant part, states as follows with regard to the Houston Petroleum Defendants:

> "... I am surely disappointed that you did not use Bobby Steelhammer (a Houston attorney) to handle the settlement with Houston Petroleum as promised. Why not ???? He is a tiger, a good man to have in your corner when dealing with slick deal artists.
>
> I would like a copy of Rod's (Defendant Johnson) resignation as Managing General Partner of Onshore Exploration Ltd. 1984. You had told me that you had Bobby Steelhammer draw up his resignation papers, because you didn't want a thief in your midst.
>
> ... you have said that the cash investors are strictly for development deals. If that is true, **did you give the money to the crooks at Houston Petroleum????"** (Emphasis Added)

Deposition testimony, similarly corroborative, has been given by Onshore's geologist, Victor B. Russek, Jr., Onshore's original General Partner, Wayne M. Byles, Onshore's securities counsel, Frank Pinedo and Onshore's independent, certified internal auditor, Mr. Frank Leggio.

Moreover, Plaintiffs' extensive discovery in this case has revealed that the Houston Petroleum Defendants participated with Onshore's General Partners in a course of business which operated as a fraud on the Plaintiffs as investors.

Furthermore, Plaintiffs, at a minimum, can clearly establish that the Houston Petroleum Defendant aided and abetted the securities violations alleged in the Complaint. Plaintiffs again call the Court's attention to Defendant Joel Middlebrook who, on cross-examination by Houston Petroleum's attorney, testified in her deposition as follows at page 466 - 467:

Q. Do you recall a month or a year in your association with Onshore that you first became aware of Houston Petroleum Company?

A. It would have to be in the Fall of '84.

Q. How about Mr. O'Donnell? The same?

A. Same.

Q. And what was the occasion that brought about your learning of Houston Petroleum Company?

A. Well, one time I went to their office, before they started the program, and visited with them. **They had several people there that showed the office and what they were going to drill, and so on. It was a kind of dog-and-pony show for potential investors that John had set up and did.** (Emphasis Added)

Q. Okay. And were you by yourself?

A. Yes; I went by myself.

Q. You did? Was anyone else at the meeting besides...

A. Oh, yes; there were other people there.

Q. Okay. Who was there?

A. I don't know their names. They were just different prospective investors that showed up.

Q. Okay. Was Ehrman there?

A. Uh-huh.

Q. Okay. Anyone else associated with Onshore?

A. I don't remember. Rod may have been there; I'm not sure. He may or may not. I don't know; I doon't remember. **I know John was there; and a bunch of potential investors were there.** (Emphasis Added)

Q. **And who made the presentation for Houston Petroleum Company?** (Emphasis Added)

A. **One of their geologists**. I don't know his name. I have forgotten his name. (Emphasis Added)

Q. Was he the only individual who spoke?

A. No. I'm sure everybody had a little something to say.

Q. Do you recall the prospect that was presented at the time?

A. It was the one that was in the notebook, the Prospectus.

Q. You don't recall the name?

A. It was called the Thornton, No. 1 Thornton.

In this regard, Plaintiffs contend that the evidence shows that these Defendants had more than just a "general awareness" of their role in the Rule 10b-5 violations and that they knowingly rendered "substantial assistance" in the violations. *See Abell v. Potomac Insurance Co.*, 858 F.2d 1104, 1126 (5th Cir. 1988). Like Defendants Rio Bravo and Kelley Onshore, the Houston Petroleum Defendants disregarded the terms and conditions of the Memorandum and commenced drilling operations before Onshore funded.

Plaintiffs' claims under the RICO statute are equally strong in view of prevailing precedent. *See generally, H. J., Inc. v. Northwestern Bell Telephone Co.*, 57 U.S.L.W. 4951 (U.S. June 27, 1989), *reversing and remanding* 829 F.2d 648 (8th Cir. 1987); *Sedima, S.P.R.L. v. Imrex Company, Inc.*, 473 U.S. 479 (1985); *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350 (5th Cir. 1985), *cited in H.J., Inc. v. Northwestern Bell Telephone Co., supra*, 57 U.S.L.W. at 4952 note 2.

Accordingly, the Houston Petroleum Defendants' contention that there is no genuine issue as to any material fact is on its face preposterous, especially given the complex facts of this case. If ever there was a case that was inappropriate for summary judgment, this is it. The Houston Petroleum Defendants' Motion for Summary Judgment is

clearly part of a large effort of certain Defendantsto avoid their day of reckoning by unnecessarily burdening Plaintiffs' counsel with paperwork. These Defendants' only hope at this point is that this Court will dismiss them from this lawsuit on any grounds possible so long as the ruling takes place prior to a trial on the merits. What Defendants want is a trial by deposition and affidavits; they fear the testimony that will be presented at trial which establishes their culpability. However, on this record, Plaintiffs are entitled to have this Court resolve the multitude of issues involving these Defendants in a trial on the merits.

1. **THE SECURITIES VIOLATIONS.** The Houston Petroleum Defendants assert that they had no duty to disclose anything to the investors because they lacked a fiduciary or other similar relationship of trust and confidence vis-a-vis the investors. They also deny liability for aiding and abetting securities laws violations, among other things.

The Houston Petroleum Defendants' contentions are without merit. Plaintiffs contend that the evidence will establish these Defendants' culpability in the scheme to defraud the Plaintiffs under Rule 10b-5. As the Fifth Circuit has noted, coverage under Rule 10b-5 is not a limited one. *Hilgeman v. National Ins. Co. of America*, 547 F.2d 298, 302 (5th Cir. 1977). The Rule, among other things, prohibits any person from engaging in "any act, practice or course of business which operates or would operate as a fraud or deceit upon any person." *Hilgeman, supra*, Section 240.10b-5.

Plaintiffs possess evidence which will establish that Defendants were participants in a scheme to enrich themselves and others at the expense of the Plaintiffs-investors. Plaintiffs will also be able to establish that the Houston Petroleum Defendants knowingly rendered

substantial assistance to others who violated Rule 10b-5.

Plaintiffs assert that the Houston Petroleum Defendants engaged in acts which operated as a fraud upon the Plaintiffs in connection with the selling of securities. At the trial on the merits, Plaintiffs will be able to clearly show that they suffered an injury as a result of deceptive practices "touching" the sale of securities to them within the meaning of Section 10b of the 1934 Securities Exchange Act. *Cf. Superintendent of Insurance v. Bankers Life & Casualty Co.*, 404 U.S. 6, 10-13 (1971).

Accordingly, Plaintiffs must be given the opportunity to prove that the Houston Petroleum Defendants not only aided and abetted violations of the securities laws but engaged in acts and business practices which operated as a fraud or deceit upon Plaintiffs in connection with their purchases of securities.

The Houston Petroleum Defendants' assertion that they had no duty to disclose anything to the investors is overbroad, inaccurate and without merit. As the Supreme Court stated in *Dirks v. SEC*, 463 U.S. 646, 655 n. 14 (1983), under certain circumstances even outsiders may become fiduciaries of investors where confidential information is legitimately revealed to an underwriter, accountant, lawyer, consultant or other persons solely for business purposes. That certainly, at a minimum, is the case here since Houston Petroleum Company was a joint-venturer in the project. Furthermore, it is also clear that one who misappropriates material information to his own advantage violates Section 10(b) and Rule 10b-5. *Cf. SEC v. Materia*, 745 F.2d 197, 203 (2d Cir. 1984); *Carpenter v. United States*, 791 F.2d 1024, 1027-1034 (2d Cir. 1986), *aff'd by an equally divided court on the 10(b) issue*, ___ U.S. ___ 108 S.Ct. 316, 320 (1987). Congress has now made clear

that liability is not dependent on a fiduciary relationship but applies to *any person* buying or selling while in possession of material undisclosed information and any persons communicating this information to others. *See "Insider Trading and Securities Fraud Enforcement Act of 1988"*, Sections 20A (a)(b)(c)(d) as amended, Pub. Law 100-704, 102 Stat. 4677 (November 11, 1988).

Accordingly, it is clear that there are many contested issues to be resolved with respect to the Houston Petroleum Defendants' liability under Rule 10b-5.

Similarly, there are numerous fact questions to be resolved concerning the Houston Petroleum Defendants liability under sections 12(1) and 12(2) of the 1933 Securities Act.

2. **RICO VIOLATIONS**. The Houston Petroleum Defendants' argument that Plaintiffs have failed to make out a RICO case against them is equally without merit. These arguments are particularly inappropriate here. Plaintiffs have gone to great lengths to plead this case with clarity and specificity. What Defendants are really requesting is that Plaintiffs prove their case in their Complaint.

Moreover, Defendants' memorandum conveniently omits any discussion of controlling cases that undermine their arguments. *See H. J., Inc. v. Northwestern Bell Telephone Co.*, 57 U.S.L.W. 4951 (U.S. June 27, 1989), *reversing and remanding* 829 F.2d 648 (8th Cir. 1987); *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350 (5th Cir. 1985).

Throughout the text of their Complaint, Plaintiffs clearly detail that they were fraudulently induced to make sizeable investments of money in an "Enterprise" which was

conceived, developed and operated for the unjust enrichment of the Defendants. The "Enterprises" referred to are clearly the limited partnerships-Onshore Exploration Ltd., 1984 Mid-Year Drilling Program in one instance, and Texas Energy, Ltd., in the other. Thus, it is plain to see that Plaintiffs are not referring to Ehrman Investment Group, Inc., or any of the other Defendants as the "Enterprise."

Plaintiffs do contend, however, that Defendants Ehrman and Ehrman Investment Group, Inc. and the Houston Petroleum Defendants, inter alia, conducted or participated, directly or indirectly, in the limited partnership -- the Enterprise -- through a pattern of racketeering activity in violation of 18 U.S.C. 1962 (c). Plaintiffs will show at trial how the various Defendants constituted an association of organizations that regularly engaged in the practice of selling and financing investments in oil and gas limited partnerships through fraud, omissions of material facts and other unlawful acts.

To require Plaintiffs to conclusively prove these matters prior to trial is not required. However, Plaintiffs contend that they will be able to prove their case if given the opportunity.

Defendants' contention that Plaintiffs will not be able to show a pattern of racketeering activity is similarly without merit. In *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350, 1354 (5th Cir. 1985), the Fifth Circuit read the "pattern and other requirements of the RICO Act broadly. The Court noted that the mailing of two (2) invoices alleged by plaintiff to be fraudulent was sufficient to constitude a pattern of racketeering activities". *R.A.G.S. Couture, Inc. v. Hyatt, supra*, 774 F.2d at 1354. The Supreme Court recently cited this case and holding in its most recent decision on RICO.

*See H. J., Inc., v. Northwestern Bell Telephone Co.*, 57 U.S.L.W. 4951, 4952, n. 2 (1989).

In this case, Plaintiffs have alleged financial injuries as a result of various predicate acts, including violations of Section 10(b) and federal mail and wire fraud statutes. These allegations are sufficient to withstand a motion to dismiss. *Corwin v. Marney Orton Investments*, 788 F.2d 1063, 1069 (5th Cir. 1986). Moreover, Plaintiffs will be able to show "acts (on the part of Defendants) that have the same or similar purposes, results, participants, victims, or methods of commission," and that are otherwise "interrelated by distinguishing characteristics." *Sedima, S.P.R.L. v. Imrex Company, Inc.*, 473 U.S. 479, 496 at note 14 (1985). *Accord: H. J. Inc. v. Northwestern Bell Telephone Co.*, 57 U.S.L.W. 4951, 4953 (1989). Accordingly, Plaintiffs believe that they have a strong case against Defendants.

As the Fifth Circuit stated in *R.A.G.S. Couture, Inc. v. Hyatt, supra*, 774 F.2d at 1355:

> "The scope of the civil RICO statute is breathtaking. An allegation of fraud in a contract action can transform an ordinary state claim into a federal racketeering charge. It may be unfortunate for federal courts to be burdened by this kind of case, but it is not for this court to question policies decided by Congress and upheld by the Supreme Court." *Id.*

Plaintiffs contend that they will be able to prove their RICO allegations at the trial of this case under any of the standards referred to by Defendants in their memorandum. The acts of the Defendants in this case which were perpetrated against the Plaintiffs were the result of their

participation, directly or indirectly, in the affairs of the Parternship through a pattern of racketeering activity. Plaintiffs are entitled to their day in court in order to prove their case.

## CONCLUSION

This difficult and complex case is clearly inappropriate for summary judgment. This is especially true for these Defendants since Plaintiffs are in the process of completing the deposition of Defendant Richard O'Donnell, president of Houston Petroleum Company. Due to conflicts in Mr. O'Donnell's attorney's trial schedule, Mr. O'Donnell's deposition has been re-scheduled on numerous occasions and was finally commenced on Friday, July 21,1989, and continued on Saturday, July 22, 1989. However, the deposition could not be concluded and Mr. O'Donnell's testimony will resume at a later date by agreement between counsel.

Factual issues abound with respect to every issue in this case. Congress has given this Court jurisdiction over defendants such as the Houston Petroleum Defendants and empowered this Court to award appropriate relief. Plaintiffs will be able to clearly establish at trial that the Houston Petroleum Defendants have played an important and substantial role in an intricate scheme to mislead and defraud investors for the personal gain of the Defendants. Plaintiffs are entitled to their day in court. Accordingly, Plaintiffs respectfully pray that the Houston Petroleum Defendants' Motion for Summary Judgment be denied.

Respectfully submitted,

/S/

Armando Lopez

LOPEZ & RAMIREZ
Fed. I.D.#: 4125
2990 Richmond Avenue, Suite 205
Houston, Texas 77098
(713) 524-4801

OF COUNSEL:

W. Sherman Rogers
Fed. I.D.#: 6281
Howard University School of Law
2900 Van Ness, N.W.
Washington, D.C. 20008
(202) 686-6436

CERTIFICATE OF SERVICE

I, Armando Lopez, hereby certify that a true and correct copy of the foregoing instrument has been hand delivered to the Houston Petroleum Defendants, by and through their attorney of record, Mr. J. Don Jackson, VINSON & ELKINS, 3300 First City Tower, 1001 Fannin, Houston, Texas 77002, and by U.S. First Class Mail to all other counsel of record and pro-se parties on this the 7th day of July, 1989.

/S/
Armando Lopez

H53

January 22, 1986

Mr. John N. Ehrman
2 Northpoint Drive Suite 300
Houston, Texas 77060

Dear John:

I need a copy of the contract with Houston Petroleum which you told me about last week. I am surely disappointed you did not use Bobby Steelhammer to handle the settlement with Houston Petroleum as promised. Why not???? He is a tiger, a good man to have in your corner when dealing with slick deal artists.

I would like a copy of Rod's resignation as Managing General Partner of Onshore Exploration Ltd 1984. You have told me that you had Bobby Steelhammer draw up his resignation papers, because you didn't want a thief in your midst.

I would like to review the accounting records and bank records on Onshore for the year 1985. You have promised to give me the records since June 15, 1985. What is your problem in letting me look at them????

Please furnish a copy of run tickets and checks from HPC on the #1 through #4 Belt wells to date.

If you will provide me with a current partners list and the royalty bank account records. I will be able to prepare the 1099's for 1985. As you know, my royalty program is completed and we are able to print checks and maintain the necessary records.

Regarding Leggio, I called him to get a copy of the Houston Petroleum and Rio Bravo Audit reports. He said that he would see about getting a copy for me and that he incidentally, needed the Oil & Gas Reserves and Kelley Onshore contracts. You now have a copy of those contracts. I would, as a second request, like to have a copy of the audit reports.

The letter to Oil & Gas Reserves was asinine. Dick Manuel must be confused. I have not talked with Terry Richardson in a year and a half at least. The one person who called me was Hop Nolen. He is the primary person there. He is incidentally a client also. Your $350,000 hot check has been a problem to say the least.

Regarding reselling 15 Onshore units, where did you get your quantity?? Vic King is 3. Ernie is 1 or 2. You are telling me Barrow is the other 10. To date he has not received the $ from the sale of his units. And he has provided you with financing statements for his units.

This is my second request for the above information. If you don't have time to gather it, I will come out to help you get it together. You were supposed to leave a check for me yesterday. What happened????? I am seriously worried about what you have done. You are now telling me that you have only sold $1,500,000 in TEL. You are not supposed to break escrow until you have $2,400,000. Is this another occasion in which you do not exactly follow the prospectus guidelines, or are you trying to screw me out of the money per our letter agreement?????

You must not have the other $7,000,000 in cash investors or you would not have all those hot checks floating around. But, you have said that the cash investors are strictly for development deals. If that is true, did you give

the money to the crooks at Houston Petroleum???? Or does the money actually exist???? Where's the beef????

I have never known you to be niggardly about money. You must be in serious trouble on this deal, to get down to trying to short change me on this.

You have mentioned that you would like for me to cut you some slack on this deal. I will be happy to talk with you about it. Please tell me the truth about what you are doing. I have a hard time with a different story each week about what the deal is.

You are saying that you normally get 7 1/2% on the note finance deal. Your prospectus calls for a 3% general partner fee and a 4% sales commission. You pay out 3% to salesmen, retaining a total of 4%. If you sell the deal yourself, you keep a total of 7%. My 1/2% is equal to 12.5% of the 4% cash to the general partner. I will be happy to take 12.5% of the fee due you on the cash investors, since you receive 3% on those.

Thus, if you have $1,500,000 of note investors, you owe $7500 for those and for the cash investors of $7,000,000, you will owe $26,250, for a total of $33,750, rather than the full amount called for in our letter agreement, thus giving you a discount of $8750.

Per your letter of Monday, you say you aren't trying to short change me, that you haven't collected the funds due you. When you say you are going to leave a check for me

to collect when the funds are wired and you don't. I do feel you are trying to jack me around.

You have been rude, disloyal and untruthful in your dealings with me and others. I have never been involved in such a drill as this. As far as I am concerned, this will be the last deal we will ever be in together. I had looked forward to working with you in the oil programs. But, the way you run your business, I don't want to be involved.

Sincerely yours,

Joel A. Middlebrook

jne.186

EXH. "A"

H57

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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NO. 90-2106

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MICHAEL K. TOPALIAN, WARREN B. FIENGA, ROY JACOBS, JR., JUAN GARCIA-QUIROGA, RICHARD OROZCO, JEAN STEUBING, CHARLES W. ANDERSON, FRANCIS COVERT, RICHARD H. MANUEL, BOBBY W. McDONALD, JACK E. BURROUGHS, DON W. BOYETT, CHARLES F. LaCELLE, RICHARD MIKLES and MJM VENTURES

Plaintiffs-Appellants,

VERSUS

JOHN N. EHRMAN, Individually, Etc., et al.,

Defendants-Appellees.

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Appeal from the United States District Court
for the Southern District of Texas

---

# BRIEF OF HOUSTON PETROLEUM COMPANY and RICHARD O'DONNELL AS APPELLEES

---

J. Don Jackson
Paul S. Wells
VINSON & ELKINS
3300 First City Tower
1001 Fannin
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(713) 758-2078

ATTORNEYS FOR APPELLEES,
HOUSTON PETROLEUM COMPANY
and RICHARD O'DONNELL

## CERTIFICATE OF INTERESTED PERSONS

Plaintiffs-Appellants

MICHAEL K. TOPALIAN, WARREN B. FIENGA, ROY JACOBS, JR., JUAN GARCIA-QUIROGA, RICHARD OROZCO, JEAN STEUBING, CHARLES W. ANDERSON, FRANCIS COVERT, RICHARD H. MANUEL, BOBBY W. McDONALD, JACK E. BURROUGHS, DON W. BOYETT, CHARLES F. LaCELLE, RICHARD MIKLES, and MJM VENTURES

Defendants-Appellees

JOHN N. EHRMAN, Individually and In His Representative Capacity As President of EHRMAN INVESTMENT GROUP, INC., EHRMAN INVESTMENT GROUP, INC., W. RODERICK JOHNSON, W. RODERICK JOHNSON, P.C., RICHARD O'DONNELL, Individually and In His Representative Capacity As President of HOUSTON PETROLEUM CO., INC., HOUSTON PETROLEUM COMPANY, INC., JOEL A. MIDDLEBROOK, JOEL A. MIDDLEBROOK, C.P.A., VICTOR B. RUSSEK, RUSSEK CO., BERT GAMBLE, Individually and In His Representative Capacity As President of RIO BRAVO OIL COMPANY, INC., RIO BRAVO OIL COMPANY, INC., LAWRENCE KELLEY, JR., Individually And In His Representative Capacity As President of KELLY ONSHORE DRILLING CO., INC., KELLEY ONSHORE DRILLING CO., INC., ROCKWOOD INSURANCE COMPANY and ROBERT E. ECKIS, JR.

OPPOSING LAW FIRMS AND/OR COUNSEL

1. Plaintiffs-Appellants, Plaintiffs-Counter Defendants-Appellants

Plaintiffs-Appellants and Plaintiffs-Counter Defendants-Appellants are represented by:

ARMANDO LOPEZ
Federal I.D. No. 4125
State Bar No. 12562800
2990 Richmond Avenue, Suite 205
Houston, Texas 77098
(713) 524-4801

Mr. Armando Lopez has retained the following attorney on an "Of Counsel" basis with respect to this litigation:

W. SHERMAN ROGERS
Federal I.D. No. 6281
Howard University School of Law
2900 Van Ness, N.W.
Washington, D.C. 20008

2. Defendants-Appellees, Defendants-Counter Plaintiffs-Appellees and Counter Plaintiff-Appellee

Defendants-Appellees JOHN W. EHRMAN and EHRMAN INVESTMENT GROUP, INC. are represented by:

FRANK PINEDO
PINEDO & SWEENER
Federal I.D. No. 1789
1415 Louisiana, Suite 2550
Houston, Texas 77002
(713) 658-0808

Defendants-Appellees W. RODERICK JOHNSON and W. RODERICK JOHNSON, P.C., are represented Pro-Se:

W. RODERICK JOHNSON
Federal I.D. No. 4497
1800 West Loop South, Suite 1510
Houston, Texas 77027
(713) 965-9979

Defendants-Appellees RICHARD O'DONNELL and HOUSTON PETROLEUM CO. are represented by:

J. DON JACKSON
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3300 First City Tower
1001 Fannin
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Counter Plaintiff-Appellant ONSHORE EXPLORATION LTD. 1984 MID-YEAR DRILLING PROGRAM (ONSHORE)

ONSHORE (the Partnership) was not a party in the original suit now being appealed, but it was brought in as a Counter-Plaintiff by the EHRMAN Defendants. It is being represented by FRANK PINEDO, counsel for the EHRMAN Defendants.

## STATEMENT REGARDING ORAL ARGUMENT

Appellees believe that although the issues presented by this appeal are clearly set forth and addressed in their brief, oral argument would be beneficial to this Court. Therefore, Appellees request oral argument.

## EXPLANATION OF RECORD REFERENCES

A final record of this case has not been completed by the District Court. Attorneys for Houston Petroleum Company and Richard O'Donnell have contacted the clerk for the Fifth Circuit and were instructed to cite directly to the pleadings and documents referred to in their brief to this Court.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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NO. 90-2106

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MICHAEL K. TOPALIAN, WARREN B. FIENGA, ROY JACOBS, JR., JUAN GARCIA-QUIROGA, RICHARD OROZCO, JEAN STEUBING, CHARLES W. ANDERSON, FRANCIS COVERT, RICHARD H. MANUEL, BOBBY W. McDONALD, JACK E. BURROUGHS, DON W. BOYETT, CHARLES F. LaCELLE, RICHARD MIKLES and MJM VENTURES

Plaintiffs-Appellants,

VERSUS

JOHN N. EHRMAN, Individually, Etc., et al.,

Defendants-Appellees.

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Appeal from the United States District Court
for the Southern District of Texas

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# BRIEF OF HOUSTON PETROLEUM COMPANY and RICHARD O'DONNELL AS APPELLEES

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TO THE HONORABLE JUDGES OF SAID COURT:

COME NOW, Houston Petroleum Company and Richard O'Donnell, as Appellees, and file this their response to the brief of the Appellants.

## STATEMENT OF THE CASE

### A. Proceedings and Disposition in the Court Below

This is an appeal from a final judgment entered against the Plaintiffs by the Honorable Judge Norman Black in the United States District Court for the Southern District of Texas, Houston Division. The Final Judgment provided that the Plaintiffs take nothing by way of their suit and was entered concurrently with an order granting summary judgment in favor of all Defendants. The Final Judgment and Order were signed by Judge Norman Black on October 4, 1989, and entered on the same date.

Plaintiffs are a group of investors in an oil and gas limited partnership known as Onshore Exploration Ltd. ("Onshore"), and have brought this action against numerous individuals and entities involved with or having some relationship with Onshore. Included among the Defendants is Houston Petroleum Company ("HPC") and Richard O'Donnell ("O'Donnell"). HPC is an oil and gas operator. HPC's only connection with Onshore is a contractual relationship whereby HPC and Onshore entered into agreements permitting Onshore to invest in wells to be drilled by HPC. O'Donnell's only connection is that he is the president of HPC.

Plaintiffs' Original Petition was filed in the United States District Court for the Southern District of Texas, Houston Division on December 3, 1987. On December 18,

1987, Plaintiffs filed their First Amended Complaint. The First Amended Complaint was Plaintiffs' operative pleading at the time summary judgment was granted. The Complaint alleged that Onshore's general partners and others defrauded Plaintiffs who purchased Onshore units. Specifically, Plaintiffs allege that Defendants violated various federal and state securities regulations, the Racketeering Influence and Corrupt Organization Act, and committed common law fraud.

On June 16, 1989, HPC and O'Donnell, along with other Defendants, filed a motion for summary judgment. Defendants HPC and O'Donnell filed their motion for summary judgment over eighteen months after the suit was filed and after numerous depositions and discovery had taken place. The depositions taken included many of the Plaintiffs, individual Defendants, Defendant entities, and other material witnesses. Based on this extensive discovery, Defendants HPC and O'Donnell's motion was filed asserting that there existed no genuine issue as to any material fact regarding any of the claims alleged against HPC or O'Donnell.

On July 26, 1989, Plaintiffs filed their response to this summary judgment motion. Although Plaintiffs' response to HPC and O'Donnell's motion was filed after the filing deadline, Judge Black graciously decided he would consider the Plaintiffs' response.

On October 4, 1989, HPC and O'Donnell's Motion for Summary Judgment was granted and a Final Judgment was entered providing that Plaintiffs take nothing. The District Court filed a supporting opinion within its order, including findings of fact and conclusions of law in connection with the Final Judgment. It is from this Final Judgment that Plaintiffs appeal.

B. Statement of the Facts

Plaintiffs are dissatisfied investors in Onshore Exploration, Ltd., 1984 Mid-Year Drilling Program ("Onshore"), an oil and gas drilling limited partnership program. First Amended Complaint at 2-4 ¶ 1-5 ("Complaint").[1] These investments were highly leveraged tax shelters promoted by John Ehrman ("Ehrman") and Ehrman Investment Group ("EIG"). Wayne Byles ("Byles") was the original general partner in Onshore. In December of 1984, Byles was succeeded by Roderick Johnson ("Johnson") and EIG as co-general partners. Complaint at 8 ¶ 46; 9 ¶ 49. HPC is an oil and gas operator that had entered an agreement with Onshore to drill wells on certain sites. Complaint at 9 ¶ 49. O'Donnell is the president of HPC and has been sued individually and as president. Complaint at 1.

Unlike many of the oil and gas programs promoted during the early 1980s, Onshore is a program that actually drilled and recovered oil and gas and has made payments to the Plaintiffs. *See* Complaint at 25 ¶ 110. In fact, Onshore continued in operation as of the date summary judgment was granted by the District Court. Plaintiffs are not dissatisfied because Onshore's promoter allegedly stole their money, the general partner is in bankruptcy, or no drilling was ever completed. Instead, Plaintiffs are dissatisfied because their investment strategy to get rich from an investment that looked lucrative in 1984 did not turn out quite as planned. *See, e.g.*, Binder dep. at 45-46. Unfortunately, because of

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1. A final record of this case has not been completed by the District Court. Attorneys for Houston Petroleum Company and Richard O'Donnell have contacted the clerk for the Fifth Circuit and were instructed to cite directly to the pleadings and documents referred to in their brief to this Court.

the inherent risk associated with oil and gas drilling, one of which is the price of oil and gas and the fact that such prices have plummeted since 1984, these programs did not turn out to be as immediately profitable as the Plaintiffs anticipated. Binder dep. at 45-46; Garcia-Quiroga dep. at 98, 101; Steubing dep. at 69-70, 107-08. Therefore, Plaintiffs have simply brought this action claiming a laundry list of fraud and deception to get out of their investments. Complaint at 3-4.

Included among Plaintiffs' allegations are claims against HPC and O'Donnell for alleged violations of the federal and state securities laws, common law fraud and Racketeer Influenced & Corrupt Organization Act ("RICO"). The undisputed evidence establishes that HPC and O'Donnell were not involved in the selling of Plaintiff's limited partnership interests, made no representations, misrepresentations, or omissions of fact to the Plaintiff-investors, and were not involved in any RICO activities. Thus, because there is a lack of evidence to support at least one essential element of each of the Plaintiffs' claims, HPC and O'Donnell are entitled to and were properly granted summary judgment.

## SUMMARY OF THE ARGUMENT

The District Court's order granting summary judgment is well reasoned and sound. In their motion for summary judgment and the accompanying evidence, HPC and O'Donnell met the initial burden of production imposed on them by the United States Supreme Court in ***Celotex Corp. v. Catrett***, 477 U.S. 317 (1986). The law does not require the District Court to specifically state in its order that a movant has met his burden of production. In any event, the District Court's order in this case, taken as a whole,

makes it clear that the court found that HPC and O'Donnell met their burden.

Plaintiffs have alleged numerous violations of federal securities laws. Without reaching the merits of these actions, the District Court found that all of Plaintiffs' federal securities laws claims were barred by the applicable statute of limitations. Some of the statute of limitations periods include a discovery rule, and the District Court correctly noted that the Plaintiffs had obtained all of the information necessary to discover any securities law violation by May of 1985, more than two years before Plaintiffs filed suit in December of 1987. Further, Plaintiffs, in their brief to this Court, have raised a claim that the reconfirmation agreements are voidable as untimely; however, this claim is raised for the first time on appeal and therefore should not be considered by this Court. Additionally, this claim, like all the other federal securities law claims, is barred by the statute of limitations.

Even assuming that some or all of Plaintiffs' securities claims are not barred by the statute of limitations, those claims fail due to a lack of some essential element or elements. HPC and O'Donnell were not "sellers" of the partnership units as required by federal securities law but rather they were only the drilling contractor hired by the partnership to drill for oil. At no time did HPC or O'Donnell engage in the sale of Onshore units. HPC and O'Donnell were also not "control" persons under the Securities Act of 1933 because they had no role in the operation or management of the Onshore partnership. Additionally, there is no Rule 10b-5 liability because the record is clear that neither HPC nor O'Donnell ever made any representations to any Plaintiff, and therefore could not make any misrepresentations. Because HPC and O'Donnell were merely the drilling contractor, and were not in a

fiduciary relationship with any Plaintiff, HPC's or O'Donnell's alleged failure to disclose any information which they supposedly had cannot be considered a misrepresentation. Likewise, because Texas case law holds that the elements of a violation of the Texas Securities Act are substantially similar to the elements establishing a violation of Rule 10b-5, Plaintiffs' Texas securities law claim also must fail.

As noted above, because HPC and O'Donnell made no representations and had no duty to disclose, HPC and O'Donnell cannot be held liable for any alleged common law fraud.

Plaintiffs assert that summary judgment is not proper in this case because Defendants, in their pre-trial order, noted the existence of twenty-eight contested issues of fact. Plaintiffs' reliance on this argument is misplaced for two reasons. First, the twenty-eight contested issues of fact listed in the pre-trial order are rendered immaterial for summary judgment purposes. This is true because of the District Court's findings that the various claims fail as a matter of law either because of statute of limitations or because of Plaintiffs' failure to provide sufficient summary judgment evidence on some element essential to their case. Second, a pre-trial order is not proper summary judgment evidence because its purpose -- to narrow the issues to be tried -- is far different from the purpose of a summary judgment, which is designed to allow the court to determine whether the contested issues are both genuine and material.

Finally, HPC and O'Donnell did not violate the federal RICO Act. First, Plaintiffs cannot establish a violation of any of the four sections of the RICO Act necessary for RICO liability. Second, Plaintiffs have presented no evidence to support their allegation that

Onshore is a RICO enterprise. Third, Plaintiffs' minimal allegations of RICO predicate acts fall far short of establishing the "pattern" necessary for RICO liability.

## ARGUMENT

### I. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT FOR HPC AND O'DONNELL BECAUSE HPC AND O'DONNELL MET THEIR BURDEN ENTITLING THEM TO SUMMARY JUDGMENT AND BECAUSE PLAINTIFFS FAILED TO BRING FORTH SPECIFIC FACTS OR EVIDENCE TO DEFEAT THAT RIGHT.

"Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The moving party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion. ***Celotex Corp. v. Catrett***, 477 U.S. 317, 323 (1986). At a minimum, the burden may be discharged by pointing out to the court that there is an absence of evidence to support the nonmoving party's case. ***Celotex***, 477 U.S. at 325. The burden then shifts to the nonmoving party to go beyond the pleadings and designate "specific facts showing that there is a genuine issue of material fact for trial" in order to defeat summary judgment. ***Celotex***, 477 U.S. at 324. HPC and O'Donnell met their burden as the movants. Plaintiffs, in their response to HPC's and O'Donnell's Motion for Summary Judgment, did not designate specific facts showing a genuine issue of material fact. Instead, Plaintiffs responded to HPC's and O'Donnell's motion by merely reasserting allegations

contained in their pleadings and representing to the District Court that they would present evidence at trial supporting these allegations. Plaintiffs failed to show specific facts which tend to contradict HPC's and O'Donnell's proof presented with the motion for summary judgment. Therefore, summary judgment was properly granted for Defendants HPC and O'Donnell.

A. HPC And O'Donnell Met Their Burden Entitling Them To Summary Judgment

HPC and O'Donnell met their initial burden by filing a motion for summary judgment negating Plaintiffs' claims and showing the absence of any genuine issue of material fact. This motion was supported by affidavits, deposition testimony and other evidence obtained through extensive discovery. See HPC and O'Donnell's Motion for Summary Judgment. HPC and O'Donnell specifically set forth their entitlement to summary judgment against the Plaintiffs' claims as follows:

1. Section 12 and 15 claims under Securities Act of 1933
   a. Plaintiffs' Section 12 and 15 claims were barred by the applicable statute of limitations in 15 U.S.C. § 77(m).

   b. HPC and O'Donnell were not "sellers" within the definition provided by the Act.

   c. HPC and O'Donnell were not "control" persons as defined by the Act.

2. Section 10b-5 claims under the Securities Act of 1934

   a. HPC nor O'Donnell made any representations to the Plaintiffs.

   b. HPC nor O'Donnell owed any duty to the Plaintiffs.

3. Claims under the Texas Securities Law

   a. Plaintiffs cannot establish a claim for the same reasons outlined in the preceding section regarding the Plaintiffs' Section 10b-5 claims.

   b. Plaintiffs admitted that neither HPC nor O'Donnell ever made any representations to them.

4. Defendants did not commit common law fraud

5. RICO claims

   a. Plaintiffs lack RICO standing.

   b. RICO enterprise cannot be established.

   c. Pattern of racketeering activity cannot be established.

   d. Plaintiffs cannot establish activities prohibited by RICO.

By providing evidence tending to negate Plaintiffs' claims, HPC and O'Donnell went beyond the minimum requirement to establish a movant's right to summary judgment -- pointing out to the District Court the lack of evidence supporting a nonmoving party's case -- and shifted the burden to the nonmovant Plaintiffs. Plaintiffs' position, "that the Defendants never met their initial burden," is without merit.[2]

B. Plaintiffs Failed To Bring Forth Specific Facts And Evidence Sufficient To Defeat HPC's And O'Donnell's Entitlement To Summary Judgment

After the moving party has met its initial burden, Rule 56(e) requires the nonmoving party to go beyond the pleadings and, by its own affidavits, depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial. ***Celotex***, 477 U.S. at 324. Plaintiffs attempted to meet this burden by making broad, conclusory allegations with promises of evidence in their possession and proof to be provided at trial.[3] "A party resisting a motion for summary judgment

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2. Throughout Plaintiffs' response to HPC and O'Donnell's Motion for Summary Judgment and Plaintiffs' brief to this Court, they have made accusations against the "Defendants" generally, without identifying which specific Defendant or Defendants of which they are complaining. This is confusing to the Court and the Defendants themselves and requires each Defendant to distinguish itself from all others with respect to a given allegation.

3. Just a few of these excerpts are: "Plaintiffs possess evidence ..."; "At the trial on the merits, Plaintiffs will be able to clearly show..."; "Plaintiffs will be able to show acts..."; "Plaintiffs at a minimum can clearly establish..."; "Plaintiffs contend that the evidence will

must do more than make conclusory allegations, it must set forth specific facts showing that there is a genuine issue for trial." ***Dart Industries, Inc. v. Plunkett Co. of Oklahoma***, 704 F.2d 496, 498 (10th Cir. 1983).

Nowhere in Plaintiffs' response to HPC and O'Donnell's Motion for Summary Judgment do they provide specific facts or evidence showing that a "genuine issue" of "material fact" exists. ***See, e.g., Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242 (1986); ***Matsushita Elec. Indus. Co. v. Zenith Radio Corp.***, 475 U.S. 574 (1986). The only "evidence" Plaintiffs offered, after 18 months of discovery, was an unsigned letter and a one page deposition excerpt from Ms. Joel Middlebrook, the bookkeeper for the partnership.[4] As the District Court correctly stated in its order, the Plaintiffs' response to HPC's and O'Donnell's motion contained "only one exhibit, a rambling, stream of consciousness letter from one Defendant to another which proves nothing." Order at p. 22. In addition, Ms. Middlebrook did not purchase any shares of Onshore and is not a plaintiff in this lawsuit. While the deposition excerpt and the letter do illustrate Ms. Middlebrook's dissatisfaction with HPC, neither of these provide evidence that HPC or O'Donnell are, or may be, guilty of possible securities act or RICO violations but only amount to mere supposition and speculation. To the contrary, the evidence clearly shows that HPC and O'Donnell made no representations, misrepresentations, omissions of fact, or had any connection whatsoever with the sale or purchase of the Onshore units. Therefore, Plaintiffs simply defaulted on their obligation to bring forth

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establish..."; "Plaintiffs will show at trial..."; "Plaintiffs contend that they will be able to prove..."

4. Ms. Middlebrook had no connection with the sale or purchase of Onshore units.

specific facts and evidence raising a genuine issue of material fact. Because HPC and O'Donnell met their burden to show their right to summary judgment, and because Plaintiffs wholly failed to bring forth specific facts or evidence sufficient to defeat that entitlement, the District Court properly granted summary judgment for HPC and O'Donnell.

C. Plaintiffs Are Not Entitled To Assert Or Present Alleged New Evidence Or Allegations For The First Time On Appeal From The Granting Of The Summary Judgment For HPC And O'Donnell.

A party appealing the granting of a summary judgment motion cannot bring forth new evidence or allegations beyond those presented to the trial court. ***Frank C. Bailey Enterprises, Inc. v. Cargill, Inc.***, 582 F.2d 333, 334 (5th Cir. 1978). On appeal, Plaintiffs are limited to the allegations and exhibits they presented to the District Court in their response to HPC and O'Donnell's summary judgment motion. Plaintiffs' brief is full of assertions and alleged evidence which was not presented to the District Court and should not be considered by this Court.[5] The Plaintiffs do not get a second chance to bring forth alleged new evidence

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5. Examples of new evidence and allegations made by the Plaintiffs for the first time are: (1) Defendants Joint Pretrial Order recognizes 28 contested issues of material fact; Plaintiffs' brief at 37. (2) Plaintiffs are entitled to avoid the reconfirmation contracts because they were "made" in violation of SEC "rules"; Plaintiffs' brief at 39 and 40. (3) Defendants' authorization of secondary sales of securities, in complete violation of Rule 502(d) of Regulation D, resulted in a continuous offering to the public for an indefinite period; Plaintiffs' brief at 45. (4) Plaintiffs are entitled to summary judgment ... since the Defendants gained Plaintiffs' reconfirmation acceptances in violation of the law. Plaintiffs' brief at 50.

for the first time on appeal in an attempt to raise a genuine issue of material fact.

Additionally, before addressing Plaintiffs' arguments concerning alleged securities violations regarding the sale of the Onshore units, the relationship between Plaintiffs and HPC and O'Donnell needs to be specifically noted. All of Plaintiffs' allegations of securities violations concern representations made to them in the sale of the Onshore units. Neither HPC nor O'Donnell were directly or indirectly involved in the sale of Onshore units to any of the Plaintiffs. HPC is an oil and gas operator that entered into an agreement with Onshore to drill prospective oil and gas wells. However, HPC and O'Donnell are forced to address each of the securities allegations because of the all-inclusive nature of Plaintiffs' charges. In this regard, the essential fact that HPC and O'Donnell's only involvement with the Plaintiffs was that of a drilling contractor for the Onshore partnership should not be overlooked.

## II. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT FOR HPC AND O'DONNELL BECAUSE PLAINTIFFS' SECTION 12(1) AND 12(2) CLAIMS ARE BARRED BY STATUTE OF LIMITATIONS

Plaintiffs allege that the Defendants violated Sections 12(1) and 12(2) of the Securities Act of 1933. Section 13 of the 1933 Act provides a clear statute of limitations for these sections:

> "No action shall be maintained to enforce any liability created under section 77k or 77l(2) [section 12 (2)], of this title unless brought within one year after the discovery of the

> untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or if the action is to enforce a liability created under section 77l(1) [section 12(1)], of this title, unless brought within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under . . . section 77l [section 12(2)] more than three years after the sale."

15 U.S.C. § 77m (1982). The District Court correctly found that both of these claims are barred by the statute of limitations.

A. Plaintiffs' Section 12(1) Claims

Plaintiffs have alleged that the sale of the Onshore units violated Section 12(1) of the Securities Act of 1933, 15 U.S.C. § 77l(1). This section creates civil liability where mail and other instrumentalities of interstate commerce are used in the sale, delivery, or offer of sale of an unregistered security, as prohibited by Section 5 of the 1933 Act, 15 U.S.C. § 77e. The 1933 Act imposes a requirement of timeliness in prosecuting a Section 12(1) cause of action. It states in pertinent part: "No action shall be maintained ... to enforce a liability created under ... 77l(1) of this title, unless brought within one year after the violation upon which it is based." 15 U.S.C. § 77m (1982).

In determining when the statute of limitations begins to run, the relevant inquiry is to determine which of a defendant's activities--offer, sale, or delivery of the security--occurred last. ***Doran v. Petroleum Management Corp.***, 576 F.2d 91, 93 (5th Cir. 1978). The limitations period begins to run upon the last action of the defendant. ***Doran***, at 93. The last action in the sale of the Onshore units was the

reconfirmation offer sent to the Plaintiffs in January of 1985. Therefore, the one-year statute of limitation established by 15 U.S.C. § 77m for any violation of Section 12(1) would have begun to run in January 1985. The latest date that any of the Plaintiffs could have filed suit in order to toll the applicable limitation period would have been in January of 1986. The Plaintiffs did not file suit until December 3, 1987, well beyond the applicable limitations period. Thus, Plaintiffs' claims for alleged violations under Section 12(1) are time-barred.

B. Plaintiffs' Section 12(2) Claims

Section 12(2) of the Securities Act imposes liability on any person who offers or sells a security by means of:

> [A] prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading. . . .

15 U.S.C. § 77l(2). Plaintiffs' Section 12(2) claims are based upon allegations that Defendants lured them into purchasing Onshore units by "general solicitations", "dog-and-pony shows" and "puffery". In essence, Plaintiffs argument is that they were assured by the Defendants that this was a sound and lucrative venture. However, each Plaintiff signed a subscription agreement with their initial purchase of Onshore units. The subscription agreement set forth the risks, warned about possible losses, and put the investor on notice of the speculative nature of their investment.

The subscription agreement's pertinent parts read as follows:

> 3.(a) **[The Investor warrants that he] (i) has adequate means of providing for his current needs ... and he has no need for liquidity of his investment ... (ii) with respect to each one (1) Unit subscribed, (1) has a net worth of at least $200,000 ... and can bear the economic risk of losing his entire investment herein, and (iii) has ... such knowledge and experience in financial matters that he is capable of evaluating the relative risks and merits of this investment.**
>
> 3.(d) **He has received and read or reviewed ... and is familiar with, the Partnership Agreement, the Memorandum, and this Agreement ...**
>
> 3.(l) **That the Partnership has no significant financial or operating history**; this is the Partnership's first venture and the Units are speculative investments which involve a high degree of risk of loss by him of his entire investment in the Partnership.
>
> 4. **The following representations, guarantees or warranties have never been made to him by the General Partners, its agents, or employees or any other person, expressly or by implication:**
>
> (ii) **The percentage of profit and /or amount of or type of consideration, profit**

> **or loss ... to be realized, if any, as a result of this investment.**
>
> (iii) **The past performance or experience on the part of the General Partners or any of its affiliates,** any securities broker of finder, their partners, salesmen, associates, agents, or employees or of any other person, will in any way, indicate or predict the results of the ownership of Units or of the overall Partnership venture.
>
> 11. **The undersigned specifically acknowledges that he/she understands that Houston Petroleum is not a General Partner in this program**. W. Roderick Johnson is the Managing General Partner and Ehrman Investment Group, Inc. is Co-General Partner of Onshore Exploration Ltd. 1984 Mid-Year. No other representations to the contrary have been implied or expressed.

Assuming Plaintiffs' allegations of misrepresentations are true, the subscription agreement put Plaintiffs on notice of possible discrepancies between what they were being told and what the subscription agreement provided. This triggered the duty to exercise reasonable diligence. ***Kennedy v. Josephthal & Co. Inc.***, 814 F.2d 798 (1st Cir. 1987). Therefore, the statute of limitations under the 1933 Act began to run when each Plaintiff had the opportunity to examine the subscription agreement.

This same issue was decided by the First Circuit in ***Kennedy v. Josephthal & Company, Inc.***, 814 F.2d 798 (1st Cir. 1987). In ***Kennedy***, glaring differences between terms

of an offering memorandum and statements made to prospective investors placed those investors on inquiry notice at the time they had an opportunity to examine the offering memorandum in light of oral representations. ***Kennedy*** at 802. The First Circuit found, as a matter of law, the exercise of reasonable diligence would require more from a party than merely viewing two sets of statements, one of which logically cannot be true, and choosing one of those sets. ***Kennedy***, 814 F.2d 803.

This lawsuit was filed on December 3, 1987. All of the Plaintiffs, except Steubling, LaCelle, Mikles and MJM, purchased their Onshore units before November 30, 1984, by executing the subscription agreement. Therefore, under the discovery rule of Section 77m, the latest date that any of the included Plaintiffs could have filed suit in order to toll the one-year limitation period would have been December 1, 1985. Disregarding the discovery rule of Section 77m, the latest date that these Plaintiffs could have filed suit to toll the three-year limitation period would have been December 1, 1987. In either instance, their claims are barred by both the one-year and three-year limitation periods in 15 U.S.C. § 77m. The remaining Plaintiffs purchased their Onshore units and executed the subscription agreement by May 1, 1985. Thus, these claims are barred by the one-year statute in 15 U.S.C. § 77m. (1982).

## III. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT FOR HPC AND O'DONNELL BECAUSE PLAINTIFFS' 10b-5 CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS

Plaintiffs allege various violations of Section 10(b) of the Exchange Act of 1934 and Rule 10b-5. Section 10(b) provides for an action by a purchaser or seller of "any

security" against "any person" who used "any manipulative or deceptive device or contrivance" in the purchase or sale of a security. 15 U.S.C. § 78(j)(b) (1982). The essential elements of a Section 10(b) and Rule 10b-5 claim are: (1) in a securities transaction (2) the defendants acting with scienter (3) made a material misrepresentation or nondisclosure (4) upon which plaintiff relied, and (5) thereby suffered injury. ***Chemetron Corp. v. Business Funds, Inc.***, 718 F.2d 725, 728 (5th Cir.), *vacated on other grounds*, 460 U.S. 1007(1983).

This Court in ***Wood v. Combustion Engineering Inc.***, 643 F.2d 339, 341 (5th Cir. 1981), determined that the appropriate limitations period for 10b-5 claims in Texas was two years. The limitations period begins to run when the plaintiff discovers, or in the exercise of reasonable diligence should discover, the alleged violations. ***Corwin v. Marney, Orton Investments***, 788 F.2d 1063 (5th Cir. 1986). By exercising reasonable diligence, the Plaintiffs should have been put on notice of any alleged misrepresentations made concerning the Onshore units when they read and executed the subscription agreement.

As noted previously, the subscription agreement was clear and concise in its warnings of the risks involved, experience of the general partners, and the possibility that all of a subscriber's investment might be lost. Any oral representations made to the Plaintiffs which was not consistent with the language of the subscription agreement put them on notice and started the limitations period running. All Plaintiffs had executed the subscription agreement by May 1, 1985. The latest date that the Plaintiffs could have filed suit asserting a claim under Section 10(b) and Rule 10b-5 would have been May 2, 1987. The present lawsuit was not filed until December 3, 1987. Therefore, under the two -year limitations period to assert a 10b-5 claim, as

determined by this Court in ***Wood***, Plaintiffs' claims under 10b-5 are also time-barred.

## IV. PLAINTIFFS' ASSERTIONS THAT THE RECONFIRMATION AGREEMENTS WERE UNTIMELY AND THUS ARE VOIDABLE CANNOT DEFEAT SUMMARY JUDGMENT BECAUSE THE CLAIM WAS NOT PRESERVED FOR APPEAL. THESE ASSERTIONS ARE ALSO BARRED BY LIMITATIONS.

In their brief, Plaintiffs have raised a claim that the reconfirmation agreements for the sale of the units are voidable because they were signed after the all-or-none offering had expired. This claim is not valid for two reasons.

First, Plaintiffs have raised this issue for the very first time on appeal to this Court. Nowhere in their First Amended Complaint did Plaintiffs allege facts establishing a right to void the agreements on this basis. Further, the issue was not addressed in HPC and O'Donnell's Motion for Summary Judgment, the Plaintiffs' response to HPC and O'Donnell's Motion for Summary Judgment, nor the District Court's order granting summary judgment to HPC and O'Donnell. Plaintiffs cannot avoid summary judgment by untimely raising an issue never before presented to the District Court nor to Defendants. ***Frank C. Bailey Enterprises, Inc. v. Cargill, Inc.***, 582 F.2d 333, 334 (5th Cir. 1978)

Second, even assuming that this claim had been plead at a proper time and place, and further assuming that the allegations are all true, Plaintiffs' claim is time-barred under the same statute which provides the right they assert. *See*

**Securities Exchange Act of 1934**, § 29(b), 15 U.S.C. § 78cc(b) (1982). This section provides that:

> No contract shall be deemed to be void by reason of this subsection in any action maintained in reliance upon this subsection, . . .unless such action is brought within one year after the discovery that such sale or purchase involves such violation and within three years after such violation.

*Id.* (emphasis added). Plaintiffs acknowledge in their brief that these reconfirmation agreements were entered into in January, 1985. Accordingly, Plaintiffs should have known that the reconfirmation agreements were made after the expiration of the all-or-none offering at the time they signed those agreements in January of 1985. Plaintiffs did not bring suit until December 3, 1987, more than two years after this discovery in January, 1985, that the reconfirmation agreements were in violation of the Securities Act, and long after the one-year deadline for filing suit had expired.

Because Plaintiffs have raised this claim for the first time on appeal and because this claim is also time-barred, Plaintiffs' assertions regarding the untimeliness of the reconfirmation agreements cannot constitute a ground for reversal of the District Court's summary judgment order.

## V. THE "20 CONTESTED ISSUES OF FACT" IN DEFENDANTS' PRE-TRIAL ORDER WERE NOT MATERIAL AND THUS ARE IRRELEVANT TO THE DISTRICT COURT'S SUMMARY JUDGMENT ORDER.

In Plaintiffs' brief, much is made of the fact that, following Defendants' motions for summary judgment, all

Defendants filed a joint pretrial order which included a list of 20 contested issues of fact.[6] See Plaintiffs' Brief at 35-36. This point is irrelevant for two reasons.

First, while Plaintiffs characterize the list in the joint pretrial order as a list of "twenty contested issues of material fact" (Plaintiffs' Brief at 36), the list is not one of "material facts" as that term is used in the summary judgment context. The Supreme Court has clearly defined materiality: "[A] complete failure of proof concerning an essential element of the non-moving parties case necessarily renders all other facts immaterial." ***Celotex,*** 477 U.S. at 323. Similarly in ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, the Supreme Court stated that "[o]nly disputes or facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." ***Id.*** at 248. Therefore, where, as here, the summary judgment evidence establishes that one of the elements of the Plaintiffs' cause of action does not exist as a matter of law, or that Plaintiffs' cause of action is barred by a statute of limitations, all other contested issues of fact are rendered immaterial.[7]

Second, a pretrial order is not listed in Rule 56(c) as proper summary judgment evidence. This is for a good reason.

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6. Plaintiffs argue that Defendant Rockwood Insurance Company ("Rockwood") listed "an additional 8 contested issues of fact." Plaintiffs' Brief at 12-13. However, for purposes of the above analysis, the discussion will be restricted to those allegations that are relevant only to HPC and O'Donnell.

7. It should also be noted that the District Court granted summary judgment after the pre-trial order containing the "twenty contested issues of fact" was presented to the Court.

> The functions of the pretrial conference described in Rule 16 and the summary judgment motion provided in Rule 56 . . . are entirely different. . . .Upon a proper showing that there is no genuine issue to be tried, a judge may grant a motion for summary judgment wholly irrespective of the terms of a pretrial order specifying a number of issues which remained after the discussion at the pretrial conference had eliminated others.

***Irving Trust Company v. United States***, 221 F.2d 303, 305 (2d Cir.), *cert. denied*, 350 U.S. 828 (1955). In short, the purpose of a pretrial order is to narrow the issues to be tried while the purpose of a summary judgment is to determine whether those issues are both genuine and material. The fact that all Defendants in this case noted 20 contested issues of fact in the pre-trial order does not prevent the District Court's subsequent determination that those issues were not material to the outcome of the case.

The preceding arguments, considered alone, are sufficient to uphold the District Court's order granting HPC and O'Donnell's Motion for Summary Judgment. However, recognizing that this Court's review of the District Court's summary judgment order is *de novo*, Defendants HPC and O'Donnell summarize additional arguments that were presented to the District Court in their motion for summary judgment. These arguments, while not reached by the District Court, provide ample grounds for sustaining the granting of summary judgment.

## VI. HPC AND O'DONNELL DID NOT VIOLATE ANY PROVISION OF THE SECURITIES ACT OF 1933

Plaintiffs' allegations under Sections 12 and 15 seek to impose liability on HPC and O'Donnell for alleged oral and written misrepresentations in connection with the offer and sale of the Onshore partnership units. Recent Supreme Court and Fifth Circuit precedent conclusively demonstrates that liability for any alleged violations of the Securities Act of 1933 cannot be imposed against HPC or O'Donnell because they do not meet the statutory definition of a "seller" under the Act.

### A. Elements Required to Establish Section 12 and 15 Claims

Plaintiffs' Complaint contains vague, confusing and essentially meaningless cross-references that attempt to assert a cause of action against HPC and O'Donnell under Sections 12 and 15 of the Securities Act of 1933, 15 U.S.C. § 77(l), (o) (1982). Complaint at 29, 34 and 39. Section 12(1) provides a cause of action against anyone who offers or sells a security in violation of § 77(e) which makes it unlawful to use interstate commerce as the means to sell a security unless a registration statement is in effect and the prospectus meets the requirement of the Act. 15 U.S.C. § 77(l)(1). Section 12(2) provides a private cause of action against any person who offers or sells a security through communications which include material misrepresentations or omissions of material facts. ***Id.*** § 77(l)(2). Section 15 provides a private cause of action against any person who controls any person liable under Sections 12(1) or 12(2). ***Id.*** § 77(o). To come within the ambit of these statutory provisions, Plaintiffs must have had to establish that HPC and O'Donnell were "sellers" of their securities.

B. HPC and O'Donnell are not "Sellers"

The Supreme Court redefined persons liable under Section 12(1) of the Securities and Exchange Act of 1933 in the case of ***Pinter v. Dahl***, 486 U.S. 622 (1988), finding that the proper inquiry is into the relationship between the investor and the defendant; not the defendant and the transaction. ***Id***. at 2080-81. In directing this inquiry, the Supreme Court specifically held that Section 12(1) "imposes liability on the owner who passed title, or other interest in the security, to the buyer for value," as well as one who "engages in solicitation." ***Id***. at 2076. This Court, following ***Pinter's*** guidance, extended that definition of "seller" to cover claims asserted under Section 12(2) of the Act in the case of ***Abell v. Potomac Insurance Company***, 858 F.2d 1104 (5th Cir. 1988). In ***Abell***, this Court held that when a court examines any claim under Section 12, two inquiries must be made: "(1) [w]ho passed title to the plaintiff or solicited the transaction in which title passed; and (2) from whom did the plaintiff buy the security?" ***Id***. at 1114.

Every case citing to and following ***Pinter*** has expressly declared that a plaintiff must demonstrate that each defendant "actually solicited their investment" for Section 12 liability to attach. *See, e.g.*, ***Capri v. Murphy***, 856 F.2d 473, 479 (2d Cir. 1988) (noting that Second Circuit precedent previously held that the language of Sections 12(1) and 12(2) is identical); accord ***Schlifke v. Seafirst Corp.***, 1989 Fed. Sec. L. Rep. (CCH) ¶ 94,174 (7th Cir. Jan. 9, 1989) (holding that a bank that financed allegedly illegal oil and gas limited partnerships was not a "seller" since it did not actively participate in the solicitation of investors or engage in preparing the prospectus except for drafting the loan documents included therein); ***Harelson v. Miller Fin. Corp.***, 854 F.2d 1141, 1142 (9th Cir.), *cert. denied*, 109

S. Ct. 274 (1988) (finding that salesman/agent of defendant corporation "solicited" sales of securities by presenting facts necessary to effectuate sale to purchaser and receiving compensation for bringing sale about); ***In re Professional Fin. Management, Ltd.***, 692 F. Supp. 1057, 1064 (D. Minn. 1988) ("Under the ***Pinter*** standard, liability may be imposed against [defendants] if they were principals to the sale or otherwise assisted in the transfer of securities as brokers, and received financial benefit in return.").

Plaintiffs muster no support for a finding that either HPC or O'Donnell could be declared a "seller" under this standard. The record is clear that neither HPC nor O'Donnell in any way "passed title or other interest" to any Plaintiff. Like the bank in ***Schlifke***, neither HPC or O'Donnell were involved in the solicitation or sale of these interests. *See* O'Donnell Affidavit, attached to HPC and O'Donnell's Motion for Summary Judgment. In fact, the Plaintiffs admitted in deposition that neither HPC nor O'Donnell took part or had any connection in the sale of Onshore units to them. Garcia-Quiroga dep. at 136; Boyett dep. at 86-87; Burroughs dep. at 22-23; McDonald dep. at 1066; Topalian dep. at 127; Steubing dep. at 151; LaCelle dep. at 144, 150, 156-57.

HPC was simply the drilling operator. The undisputed evidence establishes that HPC and O'Donnell were not involved in Onshore's selling efforts. HPC and O'Donnell had no contact with Onshore's sales personnel. *See* O'Donnell's Affidavit. Likewise, there is no evidence to support the allegation that HPC and O'Donnell participated in the preparation of the prospectus or in any way promoted the program. Moreover, the record directly refutes the contention that anyone at HPC had any knowledge of Ehrman's sales tactics. *See* O'Donnell Affidavit. To the contrary, the evidence clearly establishes the opposite:

O'Donnell testified that no HPC personnel had any knowledge of or control over the means by which Ehrman or the Onshore salesmen marketed the limited partnership interests. Boyett dep. at 109; Garcia-Quiroga dep. at 159-60; Burroughs at 84-85; Steubing dep. at 166; Topalian dep. at 135-36; McDonald dep. at 1061; LaCelle dep. at 147-48.

Every passage of record testimony in this case refutes the assertion that HPC and O'Donnell engaged in the direction of or solicitation by Onshore's sales force. HPC and O'Donnell were not engaged in soliciting sales and therefore cannot be said to have been "sellers" of these interests for purposes of the 1933 Act. Plaintiffs' claims pursuant to the 1933 Act were properly dismissed and summary judgment granted.

C. HPC and O'Donnell are not "Control" Persons Under the 1933 Act

HPC and O'Donnell's total lack of control removes any possibility of liability under either the primary, secondary, or "control person" provisions of the 1933 Act. Particularly instructive here is the new decision by the Seventh Circuit in ***Schlifke v. Seafirst Corp.***, 1989 Fed. Sec. L. Rep. (CCH) ¶ 94,174, at 91,592 (7th Cir. Jan. 9, 1989). In deciding that liability under the 1933 Act could not lie against defendant Seafirst, the court noted that:

> Although the Bank necessarily became involved in the transaction . . . to the extent necessary to fully document and protect its loans and collateral, there is no evidence that [it] thereby intended to be making an investment or that it took any steps to induce any investment by [the borrower] with [the seller].

> Thus, we agree with the district court that the Bank was acting merely as a commercial lender when it extended a loan to ENI 1981-III at a fixed rate of interest.

*Id.* at 91,597 (citations omitted, ellipses in original).

The *Schlifke* court expressly refused to allow any cause of action based on "aiding and abetting" liability under Section 12(2). *Id.* at 91,597-98. Likewise, in the recent decision of *Commins v. Johnson & Higgins, Inc.*, 1988 Fed. Sec. L. Rep. ¶ 94,092 (N.D. Cal. Sept. 28, 1988), the court explained that "control person" liability imposes liability "only on a person who 'stands behind the scenes and controls the [securities violator] who is in a nominal position of authority.'" *Id.* at 91,099 (quoting *Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1441 (9th Cir. 1987)).

The record specifically negates any contention that HPC or O'Donnell played any part in the operation or management of Onshore. *See* O'Donnell Affidavit; Boyett dep. at 109; Garcia-Quiroga dep. at 159-60; Burroughs dep. at 84-85; Steubing dep. at 166; Topalian dep. at 135-36; McDonald dep. at 1061; LaCelle dep. at 147-48. The evidence clearly shows that no HPC employee or officer directed or controlled any of the policies, management, decisions, people, or any other aspects of the business of Onshore, including any sales effort. *See* O'Donnell Affidavit.

Thus, both the record testimony and the applicable legal principles make it clear that HPC and O'Donnell played no role in the operation of Onshore, in the sale of the Onshore units, or in the solicitation of Plaintiffs' investment interests. HPC and O'Donnell did not direct or control any Onshore employee or operation. As such, HPC was merely

the drilling operator for some of the wells and cannot be found liable under the provisions of the 1933 Act.

## VI. HPC AND O'DONNELL DID NOT VIOLATE ANY PROVISIONS OF THE SECURITIES ACT of 1934

Plaintiffs additionally assert that HPC and O'Donnell violated Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5. Plaintiffs cannot recover under either theory because HPC and O'Donnell made no misrepresentation to Plaintiffs, and owed no duty to disclose and therefore made no omission of fact.

### A. Elements Required to Establish Section 10(b) and Rule 10b-5 Claims

Plaintiffs allege various violations of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5. Section 10(b) provides an action by a purchaser or seller of "any security" against "any person" who used "any manipulative or deceptive device or contrivance" in connection with the purchase or sale of a security. 15 U.S.C. § 78(j)(b) (1982). The essential elements of a Section 10(b) and Rule 10b-5 claim are (1) in connection with a securities transaction and (2) acting with scienter, the defendants made (3) a material misrepresentation or nondisclosure (4) upon which plaintiff relied and (5) thereby suffered injury. ***Chemetron Corp. v. Business Funds, Inc.***, 718 F.2d 725, 728 (5th Cir.), *vacated on other grounds*, 460 U.S. 1007 (1983); ***Pin v. Texaco, Inc.***, 1986 Fed. Sec. L. Rep. (CCH) ¶ 92,823, at 94,011 (5th Cir., July 14, 1986).

Most significantly, the Plaintiffs must prove that "the defendant(s) acted with scienter, *i.e.*, with intent to deceive,

manipulate, or defraud."[8] ***Herman & MacLean v. Huddleston***, 459 U.S. 375, 382 (1983). As the Supreme Court put it, "Section 10(b) is aptly described as a catchall provision, but what it catches must be fraud." ***Chiarella v. United States***, 445 U.S. 222, 234-35 (1980). No Plaintiff has yet to or can now point to any fact in support of their allegation that HPC or O'Donnell were guilty of fraud. Burroughs dep. at 84-85; Garcia-Quiroga dep. at 159-60; Boyett dep. at 107-09, 111; LaCelle dep. at 161-62, 183; Steubing dep. at 165-67; Topalian dep. at 135-36; McDonald dep. at 1079. Accordingly, Plaintiffs cannot establish an essential element of their 1934 Act claim.

B. HPC and O'Donnell Made No Representation to Plaintiffs

To recover under Rule 10b-5, Plaintiffs must establish that HPC or O'Donnell made a misrepresentation of material fact to the Plaintiffs in connection with the Plaintiffs' purchase of the Onshore units. ***Abell v. Potomac Ins. Co.***, 858 F.2d 1104, 1115 (5th Cir. 1988). Plaintiffs cannot recover from HPC or O'Donnell for any alleged misrepresentation since the uncontroverted testimony of the Plaintiffs establishes that neither HPC nor O'Donnell made any statements, much less untrue statements, to the Plaintiffs. McDonald dep., Vol. VI at 1062-66; Topalian dep. at 151; Garcia-Quiroga dep. at 159; Law dep. at 76; Burroughs dep. at 84-85; LaCelle dep. at 157-163, 168-69. The absence of

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8. In ***Ernst & Ernst v. Hochfelder***, 425 U.S. 185, 203 (1976), the Supreme Court refused to impose a negligence or "should have known" standard into § 10(b) or Rule 10(b)-5 actions. The scienter requirement can be satisfied with a state of mind less than actual knowledge such as "sever recklessness." This standard requires a showing that the deception was "so obvious that the defendant must have been aware of it." ***Warren v. Reserve Fund, Inc.***, 728 F.2d 741, 745 & n.12 (5th Cir. 1984).

any statements is exemplified by Plaintiff Bobby W. McDonald's deposition testimony:

> Q. Do you have any information or evidence to indicate that Richard O'Donnell or HPC made any false representations to anybody to get them to buy Onshore units?
>
> A. No, sir.

McDonald dep. Vol. VI, at 1066. As a further example, Plaintiff Charles F. LaCelle is unequivocal in his answers:

> Q. Do you have any facts that would show that HPC made any representations to you at all?
>
> A. Directly?
>
> Q. Directly or indirectly.
>
> A. No.
>
> Q. What about Mr. O'Donnell? Did he make any representations to you?
>
> A. No.
>
> Q. Would you have -- do you have any facts, or are you aware of any facts, that would show that HPC or Mr. O'Donnell assisted in any fraudulent misrepresentations that others may have made to you?

A. No.

LaCelle dep. at 161-62.

The failure of the Plaintiffs to provide the District Court with any evidence of an untrue statement of material fact by HPC or O'Donnell required that Plaintiffs' 10b-5 claims be dismissed. *See* ***Abell***, 858 F.2d at 1115-16. As such, summary judgment for HPC and O'Donnell on these claims was likewise proper.

C. HPC and O'Donnell Owed No Duty to Plaintiffs

The failure of a party to disclose facts constitutes actionable fraud only if the party had a duty to disclose the facts. ***Chiarella v. United States***, 445 U.S. 222, 230 (1980); ***Tempo Tamers, Inc. v. Crow-Houston Four, Ltd.***, 715 S.W.2d 658, 669 (Tex. App.--Dallas 1986, writ ref'd n.r.e.). Accordingly, the first step in analyzing Plaintiffs' nondisclosure claims is to determine whether HPC or O'Donnell had a duty to disclose facts to Plaintiffs.

First, as drilling operator, HPC and O'Donnell owed no fiduciary duty to the Plaintiffs. A fiduciary relationship generally arises only from a relationship of trust and confidence. ***Thigpen v. Locke***, 363 S.W.2d 247, 252-53 (Tex. 1962). A fiduciary relationship may be created from a variety of circumstances usually involving attorney-client, parent-child or some other special relationship; but generally it does not include relationships between businessmen dealing at arms length. ***Consolidated Gas & Equip. Co. v. Thompson***, 405 S.W.2d 333, 336-37 (Tex. 1966). To allow the Plaintiff investors to transform this arms length transaction between the drilling operator and the Onshore

partnership into a fiduciary duty between the operator and Plaintiffs would jeopardize the security of contracts in Texas. See ***Thigpen***, 363 S.W.2d at 253. Thus, HPC and O'Donnell had no duty to disclose based upon a fiduciary duty.

Moreover, any action by HPC to assure itself of the viability of these programs for which it was about to act as drilling operator lends no support to the conclusion of the Plaintiffs that HPC or O'Donnell owed Plaintiffs a duty to disclose facts regarding their Onshore investments. *See* ***Schlifke***, 1989 Fed. Sec. L. Rep. (CCH) ¶ 94,174, at 91,599. As one court has noted, it is ludicrous to contend that actions taken by a party in assessing its own risks in connection with a proposed transaction somehow translate into an affirmative duty to advise other participants in the transaction with regard to their decision whether or not to participate. *See* ***National Union Fire Ins. Co. v. Eaton***, 701 F. Supp. 1031 (S.D.N.Y. 1988). In ***Eaton***, the court found that the surety's review of the private placement memoranda for its own purposes did not require it to disclose any information to the investors. *Id.* The court noted that a surety has no duty to disclose adverse information it may have had. *See generally* ***Delany v. Blunt, Ellis & Loewi***, 631 F. Supp. 175 (N.D. Ill. 1986) (citing ***Woodward v. Metro Bank***, 522 F.2d 84 (5th Cir. 1975)); ***Quintel Corp., N.V. v. Citibank, N.A.***, 589 F. Supp. 1235 (S.D.N.Y. 1984); ***Schlifke v. Seafirst Corp.***, 1987 Fed. Sec. L. Rep. (CCH) ¶ 93,107, at 95,443 (N.D. Ill. 1987), *aff'd* 1989 Fed. Sec. L. Rep. (CCH) ¶ 94,174 (7th Cir. Jan. 9, 1989); ***In re Gap Stores Sec. Litig.***, 457 F. Supp. 1135 (N.D. Cal. 1978); ***Ingenito v. Bermec Corp.***, 441 F. Supp. 525, 549 (S.D.N.Y. 1977).

Plaintiffs also assert that even if HPC and O'Donnell were not engaging in primary fraud, they may have aided

and abetted the primary fraud allegedly perpetrated by other Defendants. Under Fifth Circuit precedent, parties are subject to liability for aiding and abetting a securities violation only if the following elements are proven: (1) there must have been a security violation by the primary party; (2) the aider and the abetter must have had a "general awareness" of its role in a Rule 10b-5 violation; (3) the aider and abetter must have knowingly rendered "substantial assistance" in the Rule 10b-5 violation. ***Abell***, 858 F.2d at 1126; *accord* ***Bane v. Sigmundr Exploration Corp.***, 848 F.2d 579 (5th Cir. 1988); ***Woodward v. Metro Bank***, 522 F.2d 84 (5th Cir. 1975).

To establish the "general awareness" element, Plaintiffs must prove that HPC or O'Donnell had knowledge of their role in a fraud and their commitment (or intent) to aid in the fraud's success:

> Scienter, then would require first that the alleged abettor know of the fraud's existence and generally understand how its actions aid in promoting the success of the fraud. The second element of scienter-commitment would be met where evidence shows that the abettor acts from a desire to help the fraud succeed . . .
>
> If the evidence shows no more than a transaction constituting the daily grist of the mill, we would be loathe to find 10b-5 liability without clear proof of intent to violate the securities laws.

***Abell***, 858 F.2d at 1127, (citing ***Woodward***, 522 F.2d at 97) (emphasis added).

HPC and O'Donnell played no role in the offering of the securities. *See* O'Donnell Affidavit. HPC was simply the drilling operator in this venture. Neither HPC nor O'Donnell knew of the existence of any alleged fraud nor intended to help such alleged fraud succeed. *See* O'Donnell Affidavit. All of their actions were "daily grist of the mill" actions of a drilling operator.

Similarly, Plaintiffs cannot establish that HPC or O'Donnell "substantially assisted" in the alleged fraud. *See* ***Bane***, 848 F.2d at 581. In ***Bane***, the defendant was a lender who included loan documents in an investment package for an oil and gas limited partnership and made loans to some of the plaintiffs. ***Id***. at 580. The court held that the inclusion of documents in investor packages and loaning money to the investors did not constitute "substantial assistance" for purposes of imposing liability on the lender for aiding and abetting in the securities violation under Rule 10b-5. ***Id***. at 581.

In this case, HPC acted solely as the drilling operator. Thus, HPC was even more removed from the Plaintiffs' investments than the surety, lender or escrow agent in ***Eaton***, ***Schlifke*** and ***Bane***. HPC did not review the investors' financial information and did not even know their identity until this lawsuit was filed. *See* O'Donnell Affidavit. HPC had no contact or communication in even the most remote sense with any of the investors prior to their investment. *See* O'Donnell Affidavit. HPC did not contribute to the prospectus. *See* O'Donnell Affidavit. As in ***Bane***, although a copy of the agreement between Onshore and HPC was attached to the prospectus, this is not sufficient to establish "substantial assistance." Plaintiffs even admit in their Complaint that HPC's limited role was fully disclosed in the prospectus. Complaint at 12-14. Plaintiffs have no basis for asserting that HPC or O'Donnell had any duty to disclose.

Therefore, there exists no basis for imposing liability on HPC or O'Donnell under Section 10(b) and Rule 10b-5. Accordingly, the Plaintiffs' allegations regarding these causes of action were appropriately dismissed by the District Court and the court's granting of the summary judgment was proper.

## VII. HPC AND O'DONNELL DID NOT VIOLATE THE TEXAS SECURITIES LAW

Plaintiffs allege generally that HPC and O'Donnell's actions violated the Texas Blue Sky Securities Act. TEX. REV. CIV. STAT. ANN. art. 581-33 (Vernon Supp. 1989). The elements necessary to establish a violation of the Texas Securities Act are substantially similar to those necessary to establish a violation of Rule 10b-5. Thus, a failure to prove a violation of Rule 10b-5 generally is considered a failure to prove a Texas Securities Act violation. *See* ***Keasler v. Natural Gas Pipeline Co. of Am.***, 569 F. Supp. 1180 (E.D. Tex. 1983), *aff'd*, 741 F.2d 1380 (5th Cir. 1984); ***Jeanes v. Henderson***, 688 S.W.2d 100 (Tex. 1985); ***Sibley v. Horn Advertising, Inc.***, 505 S.W.2d 417 (Tex. Civ. App.--Dallas 1974, writ ref'd n.r.e), *cert. denied*, 420 U.S. 929 (1975). For the same reasons that Plaintiffs cannot establish that HPC or O'Donnell violated Rule 10b-5, they likewise cannot establish a violation of the Texas Blue Sky Securities. Therefore, the District Court was correct in dismissing these claims and granting the summary judgment for HPC and O'Donnell.

## VIII. HPC AND O'DONNELL DID NOT COMMIT COMMON LAW FRAUD

Plaintiffs have no cause of action against HPC or O'Donnell on a theory of common law fraud. The elements of actionable fraud in Texas are (1) that a material representation was made; (2) that it was false; (3) that, when the speaker made it, he knew it was false or made recklessly without any knowledge of its truth and as a positive assertion; (4) that they made it with the intention that it should be acted upon by the party; (5) that the party acted in reliance upon it; and (6) that he thereby suffered injury. ***South Hampton Co. v. Stinnes Corp.***, 733 F.2d 1108 (5th Cir. 1984); ***Trenholm v. Ratcliff***, 646 S.W.2d 927 (Tex. 1983). As discussed above, Plaintiffs admitted in deposition that neither HPC nor O'Donnell made any representations to them and, consequently, any misrepresentations. McDonald dep. Vol. VI at 1062-66; Topalian dep. at 151; Garcia-Quiroga dep. at 159; Law dep. at 76; Burroughs dep. at 84-85; LaCelle dep. at 157-63, 168-69. Because Plaintiffs cannot establish this element necessary to establish common law fraud, HPC and O'Donnell are entitled to summary judgment.

## IX. HPC AND O'DONNELL DID NOT VIOLATE THE RICO ACT

Plaintiffs assert RICO claims against HPC and O'Donnell based upon allegations of illegal kickbacks and inflated contractual drilling prices. 18 U.S.C. § 1961 *et seq.* (1982). RICO prohibits four forms of activity: (1) investment in an enterprise engaged in or affecting interstate or foreign commerce of income obtained through a pattern of racketeering or through collection of an unlawful debt; (2) acquisition of an interest in such an enterprise

through a pattern of racketeering or through collection of an unlawful debt; (3) conduct of the affairs of such an enterprise through a pattern of racketeering or through collection of an unlawful debt; and (4) conspiracy to violate any of these three provisions. Civil remedies are available for violations of Section 1962 to persons injured "by reason of" such RICO activities. Plaintiffs' claims must fail because they cannot establish any of the essential elements of RICO and Plaintiffs have no standing to assert RICO against HPC and O'Donnell.

A. Plaintiffs Cannot Establish the Activities Prohibited Under RICO

To establish a violation of § 1962(a), the Plaintiffs must establish that HPC or O'Donnell "derived income" from a "pattern" of "racketeering activity" in which they participated as principals; and that they used or invested that income to acquire an interest in, establish or operate the enterprise. ***H.J., Inc. v. Northwestern Bell Telephone Company***, 648 F. Supp. 419, 428 n.7 (D. Minn. 1986). After extensive discovery, Plaintiffs cannot provide any evidence that either HPC or O'Donnell used or invested income derived from any pattern of racketeering activity in Onshore for any purpose. In fact, HPC and O'Donnell had no financial interest in Onshore. *See* O'Donnell Affidavit.

Under 1962(b), the Plaintiffs must establish that HPC and O'Donnell "acquired or maintained" an interest or "control" of the enterprise through a "pattern" of "racketeering activity." The object of the activity must be to gain the interest or acquire control. Control is not limited by stock or capital ownership but may exist when the defendant has some meaningful ability to direct or influence the affairs or actions of the enterprise. *See, e.g.*, ***Sutliff, Inc. v. Donovan Cos.***, 727 F.2d 648, 653 (7th Cir. 1984). Again,

there is no evidence that either HPC or O'Donnell gained an interest or controlled the affairs or actions of Onshore. The only evidence is to the contrary. *See* O'Donnell Affidavit.

To establish a violation of § 1962(c), the Plaintiffs must establish that HPC and O'Donnell were "employed by or associated with" the enterprise and "conducted" or "participated" in the conduct of the affairs of the enterprise through a pattern of racketeering activity. ***Montesano v. Seafirst Commercial Corp.***, 818 F.2d 423, 424 (5th Cir. 1987). To satisfy the conduct element, this Court has held that the person must be able to commit the predicate offenses solely by virtue of his position in the enterprise, or the predicate offenses must be related to the activities of that enterprise. ***United States v. Cauble***, 706 F.2d 1322, 1341 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984). The ***Cauble*** court, adopted the following test:

> A defendant does not "conduct" or "participate in the conduct" of a lawful enterprise's affairs, unless (1) the defendant has in fact committed the racketeering acts as alleged; (2) the defendant's position in the enterprise facilitated his commission of the racketeering acts, and (3) the predicate acts had some effect on the lawful enterprise.

***Id.*** at 1332-33. Plaintiffs have been unable to provide any evidence that HPC or O'Donnell had any position with Onshore that facilitated the commission of any alleged predicate acts. The only evidence is to the contrary. *See* O'Donnell Affidavit.

Section 1962(d) makes it unlawful to conspire to violate § 1962(a), (b), or (c). To establish a violation of § 1962(d), Plaintiffs must establish that: (1) two or more

persons entered into an unlawful agreement to violate § 1962(a), (b), or (c), as those offenses have previously been defined; (2) HPC and O'Donnell knowingly and willfully became members of the conspiracy; (3) HPC and O'Donnell agreed to commit at least two of the acts of racketeering activity alleged by Plaintiffs to create a pattern; and (4) one of the members of the conspiracy knowingly committed at least one overt act in furtherance of the conspiracy alleged. ***United States v. Cauble***, 706 F.2d at 1341; ***United States v. Phillips***, 664 F.2d 971, 1012 (5th Cir. 1981), *cert. denied*, 459 U.S. 906 (1982); ***United States v. Elliott***, 571 F.2d 880, 902-03 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978). Plaintiffs must establish that HPC and O'Donnell objectively manifested intent to participate in the affairs of the enterprise. ***Cauble***, 706 F.2d at 1341. Plaintiffs have been unable to provide any evidence nor is there any evidence that either HPC or O'Donnell knowingly and willfully became a member of any alleged conspiracy. The only evidence is to the contrary. *See* O'Donnell Affidavit.

B. Plaintiffs Cannot Establish the Existence of a RICO Enterprise

Plaintiffs' claims must be dismissed because there is no proof to support their allegations that Onshore is the RICO enterprise. The existence of an "enterprise" is a crucial element of Plaintiffs' RICO claim. *See* ***Sedima S.P.R.L v. Imrex Co., Inc.***, 473 U.S. 479, 496-97 (1985); ***United States v. Turkette***, 452 U.S. 576, 583 (1981). An "enterprise" includes any "individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). The Supreme Court defined an "enterprise" in the context of § 1962:

> The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct[,] . . . proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. . . . The "enterprise" is not the "pattern of racketeering activity"; it is an entity separate and apart from the pattern of activity in which it engages.

452 U.S. at 583. This Court defined "enterprise" as requiring, in addition:

> the existence of a decision making structure, whether hierarchial or consensual. The RICO enterprise must have a common or shared purpose and continuity of structure and personnel.

***Shaffer v. Williams***, 794 F.2d 1030, 1032 (5th Cir. 1986) (citations omitted). To establish an "association in fact" enterprise, a plaintiff must show (1) an ongoing organization, formal or informal, (2) the association had a common purpose of engaging in a course of conduct, and (3) its various members functioned as a continuing unit. ***Turkette***, 452 U.S. at 583; ***Montesano v. Seafirst Commercial Corp.***, 818 F.2d 423, 427 (5th Cir. 1987); ***Shaffer***, 794 F.2d at 1032.

This Court also recently elaborated on the distinction between the pattern and the enterprise:

> When the alleged section 1962(c) violator is a legal entity, such as a corporation, this required separation is not

> established merely by showing that the corporation, through its employees, officers, and/or directors, committed a pattern of predicate acts in the conduct of its own business. [citation omitted] Nor does the fact that individual officers and employees of a corporation, in the course of their employment associate together and commit in the conduct of the corporation's business a pattern of predicate acts in its name and on its behalf, suffice to constitute such officers and employees (alone or together with the corporation itself) an association in fact enterprise distinct from the corporation. And, in ***Montesano*** we also explained that a RICO plaintiff must plead specific facts that establish an association that exists other than merely to commit the predicate acts that show pattern.

***Old Time Enters., Inc. v. International Coffee Corp.***, 862 F.2d 1213, 1217-18 (5th Cir. 1989). The Plaintiffs' allegations in their response to the District Court's RICO Standing Order identifies the enterprise as Onshore. *See* **Plaintiffs' Response to RICO Standing Order** at 31 ¶ 6(a). There is no evidence to support the contention that Onshore functioned for the common purpose other than conduct of its own business. Neither is there any proof of any association-in-fact among the various Defendants that includes HPC or O'Donnell. *See* O'Donnell Affidavit. Thus, Plaintiffs have brought forth no evidence establishing the existence of a RICO enterprise.

C. Plaintiffs Cannot Establish a Pattern of Racketeering Activity

Plaintiffs' RICO claims should be denied because they have not established that Defendants committed a pattern of racketeering activity. A "pattern" of racketeering activity "requires at least two acts of racketeering activity." 18 U.S.C. § 1961(5) (1982). The Supreme Court in ***Sedima*** gave some insight to the "pattern" requirement:

> [A] pattern "requires at least two acts of racketeering activity," § 1961(5) (emphasis added), not that it "means" two such acts. The implication is that while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a "pattern." The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate Report explained: "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern." . . . Significantly, in defining "pattern" in a later provision of the same bill, Congress was more enlightening: "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events."

473 U.S. at 496 n.14 (citations omitted).

Since ***Sedima***, the great weight of authority has required a rigorous showing on this element. *See* ***Smith v. Ayres***, 845 F.2d 1360, 1365-66 n.18 (5th Cir. 1988); ***Crocker v. FDIC***, 826 F.2d 347, 348 n.2 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 1075 (1988); ***Montesano v. Seafirst Commercial Corp.***, 818 F.2d 423, 426 (5th Cir. 1987); ***Smoky Greenhaw Cotton Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.***, 785 F.2d 1274, 1280-81 n.7 (5th Cir. 1986), *cert. denied*, 482 U.S. 928 (1987). Thus, Plaintiffs must establish at least two predicate acts of racketeering activity, which are indictable as defined in the 18 U.S.C. § 1961(1)(A), that show "continuity plus relationship" with the legitimate business. ***Old Time Enters., Inc.***, 862 F.2d at 1217. Plaintiffs' allegations fail to meet this "continuity plus relationship" test. Plaintiffs allege that HPC paid kickbacks to Johnson and overcharged Onshore. There is no proof that these alleged acts were anything other than isolated instances.

Moreover, Plaintiffs have no evidence that the alleged "predicate acts" constitute kickbacks or that HPC overcharged Onshore. RICO's definition of racketeering activity contains a laundry list of offenses which constitute the predicate acts necessary to establish a violation. 18 U.S.C. § 1961(1). Such acts must be acts "indictable" or "punishable" under one of several listed federal criminal laws or "chargeable" under a listed state law. ***Id.*** § 1961(1)(A). The alleged kickbacks were payments from HPC to Johnson arising from transactions wholly unrelated to Onshore. *See* O'Donnell Affidavit. As Johnson testified, the transactions transpired prior to his affiliation with Onshore. Johnson dep. at 32, 35-36, 24. Johnson confirms that such payments were not kickbacks. Johnson dep. at 77. Likewise, the auditor hired to review HPC's books and records testified that he found no evidence that the payments were kickbacks. Leggio dep. at 242-44. Furthermore, the alleged overcharges are

consistent with market prices and the contractual agreement in existence between Onshore and HPC. *See* O'Donnell Affidavit. Thus, because Plaintiffs cannot establish that HPC committed "predicate acts" that constitute a "pattern" of racketeering activity, HPC and O'Donnell are entitled to summary judgment.

## CONCLUSION

For the foregoing reasons, Defendants HPC and O'Donnell, respectfully pray that the Final Judgment of the District Court, granting their motion for summary judgment be upheld and that this Court deny Plaintiffs' request for partial summary judgment.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of November, 1990, a true and correct copy of the foregoing Brief of Houston Petroleum Company and Richard O'Donnell as Appellees has been forwarded to counsel of record for Appellant, by certified mail, return receipt requested.

_____

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